CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 535

MYRL ALEXANDER WARDEN, PETITIONER

vs.

UNITED STATES, EX REL. JOHN MYRON SULICK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 4, 1947

CERTIORARI GRANTED JANUARY 20, 1947

INDEX

	Page
Record from D. C. U. S., District of Connecticut	1
Title of court and cause	1
Statement under Rule 13, subd. 4	2
Docket entries	4
Petition for writ of habeas corpus	6
Order granting writ of habeas corpus and setting hearing	23
Writ of habeas corpus	24
Return of respondent	26
Supplemental return of respondent	30
Transcript of hearing on writ (excerpts)	34
Stipulation as to exceptions to trial court's charge, and Exceptions	47
Memorandum of decision, with findings of fact, discussion and conclusions	52
Notice of appeal	73
Order admitting to bail	73
Bail bond	74
Order directing Clerk of District Court to send original exhibits to Circuit Court	76
Order extending time to file transcript of record	77
Stipulation as to record and exhibits (1)	77
Stipulation as to record and exhibits (2)	79
District court clerk's certificate	80
Proceedings in U. S. C. C. A., Second Circuit	81
Opinion, Hand, J.	81
Judgment	87
Clerk's certificate	88
Order allowing certiorari	89

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT.

OCTOBER TERM 1946

JOHN MYRON KULICK
Petitioner-Appellant

v.

M. L. KENNEDY, WARDEN
Respondent-Appellee

DISTRICT OF CONNECTICUT
APPEAL FROM THE UNITED STATES DISTRICT COURT

TRANSCRIPT OF RECORD

Statement under Rule 13, Subdivision 4

This is an appeal from an order of the United States District Court for the District of Connecticut discharging the writ of habeas corpus and remanding petitioner-appellant to the custody of M. L. Kennedy, Warden, respondent-appellee.

John Myron Kulick, petitioner-appellant, is committed to the custody of the Attorney General for a period of three and one-half years, under a judgment based on a conviction for alleged violation of the Selective Training and Service Act of 1940, as amended, because of refusing to submit to induction. He is in the custody of the respondent Warden of the Federal Correctional Institution at Danbury, Connecticut, by reason of such judgment.

On the 27th day of February, 1946, petitioner-appellant filed and presented to the court below his petition for writ of *habeas corpus*. In the petition he claimed that the judgment of conviction, whereby he is restrained by respondent-appellee, is void and subject to collateral attack. The grounds were, *inter alia*, that, upon the trial of the indictment, he was deprived of a judicial trial, his rights to make his defenses and procedural due process, contrary to the Constitution.

After considering the petition, the judge of the court below issued the writ of *habeas corpus* on the 27th day of February, 1946, and made it returnable on the 13th day of March, 1946. On the 7th day of March, 1946, the respondent filed his return to the writ and, thereafter, on the 16th day of March, 1946, filed a supplemental return to the writ.

Pursuant to stipulation the hearing of the writ and the returns was adjourned to March 22, 1946.

On the 22nd day of March, 1946, the hearing and arguments were had upon the writ of *habeas corpus* before the Honorable Carroll C. Hincks, Judge of the United States District Court for the District of Connecticut.

On the 6th day of May, 1946, Judge Hincks discharged the writ of *habeas corpus* and remanded the petitioner-appellant to the custody of respondent. He wrote a memorandum opinion, together with findings of fact and conclusions of the law. The order discharging the writ and remanding petitioner to the custody of respondent was entered and filed with the clerk of the court below on the 6th day of May, 1946.

On the 1st day of June, 1946, petitioner-appellant filed his notice of appeal. On the 4th day of June, 1946, he filed his appeal bond.

On the 20th day of June, 1946, the court below entered and filed with the clerk an order allowing petitioner-appellant to be admitted to bail and releasing him from custody of the respondent pending the determination of this appeal.

On the 26th day of June, 1946, the court below entered orders extending the time for filing transcript of the record upon appeal with this court to and including August 1, 1946, and directed that the exhibits should be sent up to this court in their original form.

The record upon appeal has been duly prepared, agreed upon by counsel, certified by the clerk of the court below and duly filed in this cause with this court.

Docket Entries

No. 1671 Civil

Feb.	27, 1946	Petition for writ of habeas corpus filed.
"	" "	Order to show cause returnable March 13, 1946 at 10:30 A. M. filed and entered (Hincks, J.) and with copies of same handed to the Marshal for service.
"	" "	Writ of habeas corpus issued and with copies of said petition handed to the marshal for service.
Mar.	1 "	Writ returned showing service.
"	7 "	Return of respondent M. L. Kennedy filed. Duplicate mailed to Carl A. Mears, Esq.
"	16 "	Supplemental return of respondent M. L. Kennedy filed. Copy of same mailed to Hayden Covington, Esq. and to Carl A. Mears, Esq.
"	22 "	Hearing had on writ of habeas corpus. Gov. Ex. 1, 2 & 3 were filed. Decision reserved. Briefs to be submitted.
"	28 "	Brief of respondent filed and was handed to Judge Hincks. Copy of same mailed to Hayden Covington, Esq.
Apr.	11 "	Written exceptions to Court's charge, S.D. New York, filed.
May	6 "	Memorandum of decision, findings of fact, discussion and conclusions and order filed and entered. (Hincks, J.)

June 1	"	Notice of appeal filed. Copy of same mailed to the U. S. Attorney.
" "	"	Application for bail pending appeal to the U. S. Circuit Court of Appeals for the Second Circuit filed. Copy of same mailed to the U. S. Attorney.
" "	"	Order denying bail pending appeal filed and entered. (Hincks, J.)
" 4	"	Appeal bond filed.
" 17	"	Certified copy of order in #1803 Eastern District of Virginia filed.
" "	"	Petition for admission to bail, & affidavit filed.
" 20	"	Hearing had on motion for bail. Motion granted. $2,000.00 bond to be furnished.
" "	"	Order for release filed and entered. (Hincks, J.)
" "	"	Bail bond filed and approved. (Hincks, J.)
June 21	"	Certified copy of order for release and bond, mailed to M. L. Kennedy, Warden, at Danbury.
" 26	"	Petition for extention of time to file transcript of record and order extending time filed and entered. (Hincks, J.)
" "	"	Praecipe for transcript of record filed. Proof of service by mail filed. Order on application that Clerk send original exhibits to C. C. A. entered. (Hincks, J.)

PETITION
for Writ of Habeas Corpus

No. 1671 Civil

[Filed Feb. 27, 1946]

To Said United States District Court:

Now comes JOHN MYRON KULICK, hereinafter called Petitioner, and complains of M. L. KENNEDY, WARDEN, respondent, and as grounds for relief respectfully shows:

1. Petitioner is a citizen of the United States and a resident citizen of the State of New York. Respondent is a citizen of the United States and a resident of the State of Connecticut.

2. Petitioner is now imprisoned and illegally deprived of his liberty by respondent in the Federal Correctional Institution, one of the United States Prisons operated by the Department of Justice, located at or near the City of Danbury in the County of Fairfield and in the State and the Federal District of Connecticut. Respondent is the warden in charge of said Federal Correctional Institution.

3. The cause or pretense of such illegal imprisonment and restraint of petitioner is a judgment rendered and entered on the 7th day of May, 1945, in the District Court of the United States for the Southern District of New York, in a certain numbered cause on the docket of said court whereby said petitioner was found guilty of violating Title 50, United States Code, Section 311, in that he allegedly did unlawfully and knowingly fail and neglect to perform a duty required of him under and in execution of the Selective Training and Service Act of 1940 and the rules and regulations duly made pursuant thereto, in that he failed and neglected to submit to induction into the armed forces of the United States, and thereupon was committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of three and one-half (3½) years. No fine or costs were imposed upon petitioner in said judgment. A copy of said judgment and commitment is attached hereto and marked as EXHIBIT A, and is incorporated herein and made a part thereof.

4. Said imprisonment and restraint are illegal and the judgment and commitment are void because

(a) The indictment (copy of which is attached hereto and marked as EXHIBIT B and incorporated herein and made a part hereof) and all subsequent proceedings were void for the reason that the draft boards and the armed forces did not have jurisdiction to order the petitioner to submit to induction because he was known to the boards to be and was a "[redacted] ordained minister of religion" exempt from all [redacted]ning and service under the Act, and the action of the boards constituted a violation of due process of law; and

(b) the indictment and all subsequent proceedings were void for the reason that the United States District Court for the Southern District of New York did not have jurisdiction of the offense because the delinquency proceedings by the boards to institute the prosecution were void since the orders to report for and submit to induction were void, and the action of the boards and of the armed forces constituted a violation of due process of law; and

(c) the judgment and commitment are void because upon the trial petitioner was denied the right of trial by jury and his right to prove any substantial defense to the indictment under his plea of "not guilty", contrary to Article III of the Constitution of the United States and the Fifth and Sixth Amendments thereto.

Petitioner alleges hereinafter in greater detail the reasons why said imprisonment and restraint are illegal. Upon

a hearing hereof petitioner expects to make good each and every allegation of this petition.

5. Your petitioner duly registered under the Act with Local Board 254 for Queens County, Jackson Heights, New York. He was assigned Order Number 12481. Thereafter he filed his Selective Service Questionnaire (DSS Form 40) with the said local board in the time and manner required by law. Petitioner, in Series IV of said questionnaire, gave his occupation as pioneer missionary evangelist establishing churches for the Watchtower Bible and Tract Society, and ordained minister preaching the Gospel of God's Kingdom. Said Society is duly recognized by the Selective Service National Headquarters as a religious organization within the meaning of the Act. In Series VIII, petitioner showed that he was a minister of religion and customarily served as such minister and was formally ordained long prior to filing his questionnaire by said recognized religious organization. He established that he was a duly ordained minister of religion. He requested that the local board recognize and grant his exemption provided by Section 5 (d) of the Act and place him in Class IV-D pursuant to Section 622.44 of the Regulations. He attached to his questionnaire a statement and other evidence which was undisputed, giving substantial and uncontradicted proof that he was an ordained minister of religion serving full time as a pioneer minister and missionary evangelist of Jehovah's witnesses, preaching the Gospel of God's Kingdom. He explained that the purpose of his ministry was to give a testimony before the people that Jehovah is the Almighty God. He quoted his Scriptural ordination from Isaiah 61: 1-2. He filed a copy of his certificate of ordination from the Watchtower Bible and Tract Society. The local board refused to recognize his claim for exemption and classification in IV-D and illegally classified him in Class 1-A on March 30, 1943, making him liable for train-

ing and service. He requested a personal appearance in which he protested against this classification and filed therewith affidavits from other ministers attesting to his status as an ordained minister and corroborating previous evidence. The local booard declined to grant the personal appearance but informed him his case was being reconsidered. Thereafter the local board recognized his ministerial claim and provided him with Class IV-D on May 5, 1943. The petitioner was retained in such classification and exempt status for over fifteen months when, without previous notice to him of a reopening of his classification, he was deprived of his exempt IV-D classification and placed in Class I-A, again making him liable for training and service. From the time of his classification in IV-D until his reclassification into I-A he did not change his ministerial status nor discontinue devoting substantially all of his time to the performance of his ministerial work. He thereafter requested a personal appearance which was granted, but the local booard was prejudiced and refused to permit him to offer full evidence of his exemption and denied him a fair hearing, thus abridging his procedural rights to make a complete record before the board of appeal, in violation of the due process clause of the Fifth Amendment to the United States Constitution. He was allowed to file additional affidavits from other ministers showing that he was doing ministerial work both as a pioneer and assistant to the presiding minister of a congregation of Jehovah's witnesses. The day following his personal appearance the local board continued him in Class I-A on August 31, 1944. Accordingly on September 8, 1944, he filed a written appeal to the board of appeal. Thereafter he took his preinduction physical examination on September 11, 1944, and was duly accepted and on said date mailed a certificate of fitness showing he was physically fit, acceptable for general military service. On October 3, 1944, the local board mailed him Notice of Classification show-

ing the board of appeal had continued him in Class I-A, making him liable for training and service.

6. Thereafter, in October 1944, the Director of Selective Service declined to make an appeal to the President in behalf of petitioner. Such action by the Director did not constitute a determination by him that petitioner was not a minister of religion, but was a refusal to exercise discretion under Section 628.1 of the Selective Service Regulations. Petitioner was mailed Order to Report for Induction on October 20, 1944, directing him to report on November 9, 1944. Petitioner reported on November 9, 1944, at the induction station as directed because he wanted to go as far as he could in the process of induction without joining the armed forces, to protect his rights, because he was a "minister of religion", exempt from training and service, and the boards had unlawfully denied his claim and illegally ordered him to report for induction, contrary to the Act and Regulations.

7. At the Local Board 254, Jackson Heights, New York, petitioner appeared and answered the roll call at 9:00 A.M. on November 9, 1944. He left with the other inductees for the induction station at Grand Central Palace, New York City. He arrived with the other inductees at about 9:15 A.M. Thereafter he entered upon the process of the armed forces and went through all the routine thereof including a physical examination to discover whether his physical condition had changed since the last acceptance and upon such physical examination he was again accepted for training and service by the armed forces. Thereafter petitioner was ordered to submit to induction, which he declined to do, and refused to submit to induction. He was advised he was liable for prosecution in the courts for refusal to so submit and was again asked to submit, which he declined to do. He thereupon was required to sign a statement that he did not submit to induction because he was an ordained minister and as such exempt from military service. There-

upon he was charged with a violation of the Selective Training and Service Act, as amended, by refusing to thus submit to induction.

8. By reason of petitioner having undergone all the necessary physical examinations, having been declared accepted by the armed forces, and complied with all other regulations except the order requiring him to submit to induction, petitioner exhausted all of his administrative remedies and completed the selective process so as to qualify himself for judicial review of the illegality of the action of the draft boards in classifying him as liable for training and service and in denying his claim for exemption as a minister of religion under Section 5 (d) of the Act, and to show that the administrative agency had denied all of his rights of procedural due process to a fair hearing by the board of appeal in that the local board was prejudiced, and at the hearing and personal appearance before the local board, the local board failed to make a full, adequate and complete record in writing of all the evidence offered at said hearing, and for each of the other reasons shown herein.

9. At the time petitioner registered under the Act, at the time he filed his questionnaire, at the time he was classified and when he was ordered to report for induction, as well as at the time of his trial in the district court, he was, and still is, a duly ordained minister of religion, and of Jehovah's witnesses and the Watchtower Bible and Tract Society. Said Society and Jehovah's witnesses are Christian organizations whose sole activity is preaching and disseminating Bible doctrines and conducting organized Bible studies publicly and in the homes of the people through duly authorized representatives who are ordained ministers of the gospel, missionaries and evangelists specially commissioned and trained to do such preaching. They are duly recognized, as aforesaid, by Selective Service National Headquarters and by the United States Govern-

ment as a recognized religious organization under the Selective Training and Service Act of 1940, as amended.

10. Petitioner has consistently submitted full and conclusive evidence that he was and is one of Jehovah's witnesses and, as such, a duly ordained minister of Jehovah God and of the Watchtower Bible and Tract Society, a Christian organization. He submitted proof from other of Jehovah's witnesses with whom he was associated showing they recognized him as performing the duties of an ordained minister. He submitted proof that he is recognized as such minister by the Watchtower Bible and Tract Society. Proof of petitioner's ministerial status was submitted in the questionnaire, supported by a copy of his certificate of ordination from the Society, by affidavits from many other persons recognizing and corroborating his ministerial status, and by other documents, all of which proof are now on file and in the possession of said local board with which petitioner is registered. At all times petitioner has devoted more hours to actual preaching and teaching of the gospel of Jesus Christ in the manner required by Jehovah's witnesses than are devoted by the ordinary clergymen of orthodox religions. At the time of receiving his classification of I-A he was devoting substantially his full time to such preaching activity as a "pioneer" minister of Jehovah's witnesses. All the foregoing facts were duly and timely made known to the Selective Service System as a basis for consideration of his classification, and such facts are undisputed and uncontroverted.

11. The said draft boards that considered petitioner's case refused and failed to consider the foregoing proof that your petitioner submitted, showing that he was an ordained minister of religion within the meaning of Section 5 (d) of the Act, and thereby—

(a) said boards acted contrary to and in violation of Section 622.44 of the Selective Service Regulations promulgated by the President of the United States,

concerning classification of regular and duly ordained ministers of religion;

(b) said boards ignored and disregarded and failed to consider or apply Opinion No. 14 of National Headquarters of Selective Service concerning Jehovah's witnesses, under which petitioner would have been declared to be a duly ordained minister of religion;

(c) said boards discriminated against petitioner contrary to the due process clause of the Fifth Amendment to the United States Constitution;

(d) said administrative agency deprived petitioner of his procedural rights of due process to a full and fair hearing by a fair and unprejudiced board contrary to the due process clause of the Fifth Amendment to the United States Constitution.

12. Your petitioner asserts that there was no evidence, oral, documentary or written, before the draft boards which disputed his claim and evidence concerning his status as a minister of religion. The boards did not claim that petitioner was an impostor or fictitiously or falsely claimed that he was a minister of the Watchtower Bible and Tract Society and one of Jehovah's witnesses, and a recognized representative of said Society. There was no evidence in any form before the boards which showed that petitioner was not a minister of religion. By reason of the foregoing, the said draft boards did not have authority or jurisdiction under the statute to order him to report for training and service under the Act because, upon the facts and evidence before the boards, petitioner was exempt from all training and service. The said boards had no discretion or authority under the law to reject petitioner's claim that he was an "ordained minister of religion" and, as such, statutorily exempt, which said claim in effect constituted a special plea to the jurisdiction of the said draft boards. The acts of the agency were ultra [redacted]

13. The foregoing acts and conduct of the local board in rejecting petitioner's claim for exemption when there was no evidence in the file contrary to such claim, constituted gross error specifically in violation of Sections 623.2, 627.13 and 622.44 of the Regulations and Section 5 (d) of the Act. Furthermore, such acts and conduct of said local board constituted prima facie unlawful discrimination against petitioner and in favor of clergymen of orthodox religions because the undisputed proof showed that petitioner spent more time actually preaching the gospel than the orthodox clergy. The acts and conduct of said boards in rejecting petitioner's claim for exemption and ordering him to report for induction constituted and is a denial of his liberty and fundamental rights without due process of law, contrary to the Fifth Amendment to the United States Constitution.

14. Subsequent to the foregoing illegal action of the boards, the grand jury of the United States District Court for the Southern District of New York returned an indictment against petitioner (attached to this petition as EXHIBIT B) charging him with an alleged violation of section 311 of Title 50 of the United States Code for having failed to submit to induction as ordered by said local board and the armed forces. The indictment was filed in said court. Petitioner pleaded "not guilty". On May 2, 1945, the case against petitioner was called for trial to a jury before United States District Judge Mortimer S. Byers of said court. Upon the trial of said cause petitioner's entire draft board file was offered in evidence, which, with the exception of the order to report for preinduction physical examination and order to report for induction, showed on their face that petitioner was a minister of religion and as such claimed statutory exemption from training and service and that he had been denied his rights contrary to the due process clause of the Fifth Amendment. Upon the trial he sought to offer evidence, including petitioner's testi-

mony in his own behalf, showing that he was an ordained minister and that such fact was properly called to the attention of his local board as provided by the Regulations. In each instance, the judge ruled out all of such above evidence, holding that it was not material in that petitioner could not show the illegality of said boards' action in defense to the indictment. When the trial judge charged the jury as to the law of the case, he specifically denied the jury the right to consider whether petitioner was exempt from training and service because an ordained minister of religion and whether the agency had violated the law, the Constitution and petitioner's procedural rights. He told the jury that such was a matter solely for the determination of the draft boards and the action of such boards was unimpeachable in the criminal proceedings and conclusive upon the court and jury, and the jury could not and should not consider such issues or defenses to the indictment. The judge informed the jury that the only question was whether or not petitioner failed to submit to induction. The judge further instructed the jury that they could not and would not determine whether the draft boards illegally and unlawfully rejected and ignored petitioner's claim for exemption from military training and service. To each action of the court in refusing to allow him to make said defense the petitioner objected and excepted and claimed that it was a violation of his constitutional right to deny him the right to make the defense tendered and requested which constitutional objections have been restated in his petition.

15. The acts and conduct of the trial judge involving the said indictment against petitioner violated the fundamental rights of petitioner. The aforesaid conduct of the trial judge was an outright denial of the right of trial by jury upon the defenses under the Act, and was a transfer of judicial powers and functions of the trial judge and trial court from the United States District Court to the

draft boards. The submission of the case to the jury on the one question of whether petitioner failed to submit to induction as ordered by the local board, and the refusal of all other questions was tantamount to putting petitioner through a "trial by ordeal" under a bill of attainder, contrary to the Constitution before the jury in the district court, because the real issue of duty under the Act was ignored and suppressed by the court. The above described conduct of the trial judge constituted a violation of Clause 3 in Section 9 of Article I of the Constitution as well as Article III thereof, and Amendments 1 and 6 thereto, guaranteeing the procedural rights of a defendant charged with crime; and thereby petitioner was denied his liberty and rights without due process of law.

16. Petitioner would show that after having been adjudged guilty upon the verdict of the jury on May 2, 1945, as charged in the indictment, he was sentenced on May 7, 1945, by the court and ordered to be confined for a period of three and one-half (3½) years in an institution designated by the Attorney General. Thereafter petitioner was incarcerated.

17. The manner in which the draft boards have construed section 5 (d) of the Act, in denying petitioner's claim for exemption, violates the Fifth Amendment to the Constitution and it is void as construed and applied. The Act and Regulations have been construed so as to impose on a minister of religion exempt from duty an obligation to comply with illegal orders and thus said Regulations and Section 11 of the Act, containing the criminal sanctions clause, are void because in violation of Clause 3 in Section 9 of Article I of the United States Constitution and the Fifth and Sixth Amendments thereto. The courts and the boards have thus made the Act unconstitutional.

18. By reason of the foregoing, the entire proceedings against petitioner, including the return of the indictment,

judgment and commitment, are illegal, a nullity and void, and just as though no proceedings ever were had against petitioner. Petitioner being now more fully informed of his legal rights, believes that he has been denied his legal rights, contrary to the United States Constitution, in such a manner as to make the proceedings a nullity and subject to review and collateral attack, upon an application for writ of habeas corpus.

19. The court is requested to review, in addition to or exclusive of the issue of exemption from duty, the evidence before the boards as to the classification made and/or as to petitioner's status under the Act, petitioner asserting that (a) there was no evidence before the boards to support their findings, classifications and acts; (b) in arriving at their determination said boards acted arbitrarily and capriciously and in utter disregard of petitioners rights; (c) said boards grossly and clearly abused their discretion, illegally misused their powers and disregarded the evidence submitted by petitioner showing he was a "minister of religion", exempt from training and service; (d) said boards acted unwarrantedly on the substantive facts before them concerning petitioner's ministerial status; (d) the findings of said boards do not have a basis in substantive evidence and are contrary to the undisputed evidence showing petitioner to be a minister of religion; (f) said boards were prejudiced against petitioner and discriminated against him because of his creed and faith, and otherwise departed from the applicable rules of procedural law and administrative regulations. That each of the foregoing grounds constitutes a denial of petitioner's rights, liberty and privileges without due process of law, contrary to the Fifth Amendment to the United States Constitution.

20. Petitioner desires to make good by proof and evidence the allegations hereinabove shown concerning illegal conduct of said boards and the said trial judge in the

district court. This Court is requested to cause to be issued subpoena duces tecum unto the clerks of said tribunals to produce all records and evidence in all proceedings had before said tribunals concerning petitioner for the purpose of a review by this Court at the time of the hearing of this petition. Petitioner further says that a writ of certiorari should forthwith issue to said United States District Court for the Southern District of New York and to said local board and its clerk and chairman directing them and each of them to certify to this Court all said proceedings which took place before said tribunals concerning the status of said petitioner under the Selective Training and Service Act of 1940, as amended, and Regulations thereunder.

WHEREFORE, petitioner prays that the writ of habeas corpus be issued by this Court, or, in the alternative, a show cause order be issued, directed to said respondent, his deputies or agents and successors in office, and each of them, to bring and have the body of JOHN MYRON KULICK in court at a time to be fixed by this Court, together with the true cause of the detention of said petitioner, to the end that due inquiry can be had as to the foregoing allegations concerning the illegality of petitioner's restraint and detention and that, upon a hearing hereof, the judgment of conviction and the commitment be declared null and void and that petitioner be discharged and restored to his liberty together with all rights as a citizen of the United States; and your petitioner further prays that a writ of certiorari issue, at the time the writ of habeas corpus or the notice of show cause order issues upon this petition, directed to the clerk and chairman of petitioner's Local Board No. 254, Queens County, 86-18 Northern Boulevard, Jackson Heights, New York, and to the clerk of the United States District Court wherein petitioner was convicted and sentenced to the custody of respondent, di-

recting them and each of them to certify to this Court all the proceedings which took place before said boards or said court, together with all papers, affidavits, motions, judgments, orders, evidence, testimony and other matters pertaining to all the proceedings which took place before said boards or said court in the matter of said petitioner under the Selective Training and Service Act of 1940, as amended, resulting in the arrest or detention of petitioner for the alleged violation of the Act, Regulations, or order to report for and submit to induction, to the end that this Court may proceed to determine the facts of this case in regard to your petitioner's restraint and detention, and thereupon make and enter such order herein as to the Court seems proper. Petitioner prays for such other and further relief to which he may show himself justly entitled.

Hayden C. Covington
HAYDEN C. COVINGTON
117 Adams Street
Brooklyn 1, New York

CARL A. MEARS
Chamber of Commerce Building
185 Church Street
New Haven 10, Connecticut
Attorneys for Petitioner

STATE OF CONNECTICUT, County of Fairfield, ss:

JOHN MYRON KULICK, being sworn, says that he is the petitioner herein and employed counsel to prosecute the petition for writ of habeas corpus; that he duly authorized said attorney to bring this proceeding and that he has read the foregoing petition and that the allegations of fact contained therein are true and correct.

John M. Kulick
JOHN MYRON KULICK

Subscribed and sworn before me this
27th day of February, 1946:

Kenneth E. Nieman
A. W.
"Authorized by the Act of February
11, 1938, to administer Oaths."

[Seal]

STATE OF NEW YORK, County of Kings, ss:

Hayden C. Covington, being sworn, says that he is a member of the bar of the State of New York and of the Second Circuit Court of Appeals; that he was requested by the petitioner herein, John Myron Kulick, to institute habeas corpus proceeding to obtain release of said petitioner from the custody of the Warden of said Federal Correctional Institution; that affiant is duly authorized to institute this proceeding in behalf of said petitioner; that affiant has read the foregoing petition for writ of habeas corpus and says that all the allegations of fact contained therein are true and correct.

Hayden C. Covington
HAYDEN C. COVINGTON

Subscribed and sworn to before me this
26th day of February 1946:

William K. Jackson
William K. Jackson
NOTARY PUBLIC Kings County
Kings Co. Clk's No. 97, Reg. No. 62-J7
Commission Expires March 30, 1947

[Seal]

EXHIBIT A

Judgment and Commitment

[Filed May 7, 1945]

DISTRICT COURT OF THE UNITED STATES
Southern District of New York

UNITED STATES OF AMERICA
v.
JOHN MYRON KULICK

C. 119/62

Violation of U. S. C. Title 50, Sec. 311. Failure to submit to induction into the Armed Forces of the U. S.

On this 7th day of May 1945, upon the proceedings heretofore had herein and on motion of the United States Attorney, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of THREE AND ONE HALF YEARS.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

[signed] MORTIMER W. BYERS
United States District Judge

EXHIBIT B

Indictment

IN THE DISTRICT COURT OF THE UNITED STATES
For the Southern District of New York

Southern District of New York, ss: The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that District, upon their oath present:

That heretofore, to wit, on or about the 9th day of November, 1944, at the Southern District of New York and within the jurisdiction of this Court,

JOHN MYRON KULICK,

the defendant herein, did unlawfully and knowingly fail and neglect to perform a duty required of him under and in execution of the Selective Training and Service Act of 1940, and the rules and regulations duly made pursuant thereto; that is to say, that at the time and place aforesaid, the defendant herein was required, pursuant to the Selective Training and Service Act of 1940, and the rules and regulations duly made pursuant thereto, to submit to induction into the Armed Forces of the United States; that said defendant unlawfully and knowingly did fail and neglect to submit to said induction into the Armed Forces; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, Section 311, United States Code).

JOHN F. X. McGOHEY
United States Attorney

Order Granting Writ of Habeas Corpus and Setting Hearing

The duly verified petition of JOHN MYRON KULICK for a writ of habeas corpus was presented to me in chambers at New Haven, Connecticut, on the date shown below, and was read and considered by me. Upon the petition it is

ORDERED AND DECREED that the petition be filed by the clerk upon payment of the required deposit for costs; and it is further

ORDERED AND DECREED that the writ of habeas corpus be granted and the clerk of this Court shall issue a writ to the Marshal of this Court to be served upon M. L. Kennedy, Warden of the Federal Correctional Institution at Danbury, Connecticut, commanding him to appear before Honorable Carroll C. Hincks, United States District Judge and produce the body of JOHN MYRON KULICK at the courtroom of the United States District Court in the United States Court House at New Haven, Connecticut, on the 13th day of March, A. D. 1946, at 10:30 o'clock in the forenoon on such day, at which time and place the parties shall be heard as to whether or not the petitioner, JOHN MYRON KULICK, shall be discharged, or whether the writ of habeas corpus shall be discharged.

Done at New Haven, Connecticut, on this 27th day of February, 1946.

C. C. Hincks

United States District Judge

Writ of Habeas Corpus

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To M. L. Kennedy, Warden Federal Correctional Institution, Danbury, Connecticut—GREETING:

YOU ARE HEREBY COMMANDED, that the body of John Myron Kulick by you restrained of his liberty, as it is said detained by whatsoever names the said John Myron Kulick may be detained, together with the day and cause of being taken and detained, you have before the Honorable Carroll C. Hincks, Judge of the United States District Court in and for the District of Connecticut, at the court room of said Court, in the City of New Haven at 10:30 o'clock A. m., on the 13th day of March, 1946, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

WITNESS the Honorable CARROLL C. HINCKS

United States District Judge at New Haven this 27th day of February, A. D. 1946.

(Seal) C. E. PICKETT *Clerk.*

No. 1671 Civil

Returnable March 13, 1946.

New Haven, Conn.
February 27, 1946

United States of America }
District of Connecticut } ss

I hereby certify and return that pursuant to the within order I this day served the Warden of the Federal Correctional Institution at Danbury, Conn., by mailing three certified copies of this order and three certified copies of the writ of habeas corpus directed to M. L. Kennedy, Warden, Federal Correctional Institution, Danbury, Conn., together with three copies of petition for writ of habeas corpus.

Bernard Fitch, U. S. Marshal
Attest:

Bernard Fitch

No Expense

Return of Respondent M. L. Kennedy

[Filed March 7, 1946]

The Respondent herein, M. L. KENNEDY, Warden, Federal Correctional Institution, Danbury, Connecticut, appearing herein by Adrian W. Maher, United States Attorney, and Valentine J. Sacco, Assistant United States Attorney, in and for the District of Connecticut, hereby produces the body of the Petitioner in compliance with the Order of this Court, and in answer to the Writ of Habeas Corpus issued by this Honorable Court, respectfully alleges as follows:

1. So much of Paragraph 1 of the Petition as alleges that Respondent is a citizen of the United States and resident of the State of Connecticut is admitted. The Respondent has no knowledge as to the remainder of said paragraph and leaves Petitioner to his proof thereof.

2. All of the allegations of Paragraphs 2 and 3 of the Petition are admitted, exept those portions which allege that Petitioner is "illegally deprived of his liberty" and "illegally imprisoned" in the Federal Correctional Institution at Danbury, Connecticut.

3. Paragraphs 4, 8, 11, 13, 15, 17 and 18 of the Petition are denied.

4. As to Paragraphs 5, 6, 7, 9, 10 and 14 of the Petition, the Respondent has no knowledge and leaves the Petitioner to his proof thereof.

5. Respondent has no knowledge concerning the allegations of Paragraph 12 of the Petition beginning with the words "Your Petitioner asserts" and ending with the words "minister of religion" (line 10), and leaves Petitioner to his proof thereof. The remainder of said paragraph is denied.

6. Paragraph 16 of the Petition is admitted.

It is respectfully alleged that upon its face the Writ of

Habeas Corpus is insufficient in law and that the Writ thereof should be quashed because:

a. The Petitioner is now imprisoned and deprived of his liberty by Respondent in the Federal Correctional Institution at Danbury, Connecticut, by virtue of a judgment rendered and entered on the 7th day of May, 1945 in the District Court of the United States for the Southern District of New York and a commitment issued on said judgment by a Judge of said United States District Court for the Southern District of New York upon the conviction of the Petitioner for a violation of Title 50, Section 311, U.S.C.A. (A copy of said judgment and commitment is attached to Petition and marked Exhibit "A").

b. The Petition does not allege facts to show that the criminal proceedings which resulted in the Petitioner's conviction and subsequent judgment and commitment thereon were not regular, fair and in compliance with the statute under which Petitioner was indicted and of the law applicable in such case, nor does the Petition allege facts from which this Court can determine that the criminal proceedings were either irregular, unfair or not in compliance with the said statute. (Title 50, Section 311, U.S.C.A.)

c. The Petition does not allege any facts which entitle this Court to review the judgment and commitment of the United States District Court for the Southern District of New York.

d. The Petition does not allege facts which entitle this Court to review the findings and conclusions of Local Board 254 for Queens County, Jackson Heights, New York, which classified Petitioner in Class 1-A and ordered him to report for induction on November 9, 1944.

e. The Petition does not allege that there was no evidence before Local Board 254 for Queens County, Jackson Heights, New York, upon which the Local Board could have

based its findings and conclusions and classification of the Petitioner in Class 1-A.

f. It does not appear in the Petition that the issues sought now to be litigated in this Court have not already been determined by Local Board 254 for Queens County, Jackson Heights, New York, adversely to the Petitioner in proceedings which were regular, fair and in compliance with the statute and regulations applicable thereto.

g. This Court cannot give judicial review to the findings and conclusions of Local Board 254 for Queens County, Jackson Heights, New York, under the Selective Training and Service Act of 1940, which Act makes the findings of the Local Board final and not subject to review.

h. The Petition seeks to accomplish a review of the judgment of the United States District Court for the Southern District of New York, entered on May 7, 1945, which judgment is properly reviewable only by appeal to the Circuit Court of Appeals for the Second Circuit within the statutory period. The statutory period for appeal from the verdict of guilty and the judgment of said Court on said verdict has long since expired and the term of court at which said judgment was entered on May 7, 1945, has likewise expired. Petitioner's failure to perfect his appeal within the statutory period, therefore, bars him from the judicial review of said judgment and conviction.

i. The judgment of the United States District Court for the Southern District of New York sentencing Petitioner to imprisonment cannot be collaterally attacked in this Court by Writ of Habeas Corpus. The alleged denial of a full and fair trial before said United States Court is reviewable only upon direct appeal from the judgment of conviction.

j. The Petitioner has been afforded due process of law in all respects; he was duly indicted by the Grand Jury for the Southern District of New York and charged with a violation of Title 50, Section 311, U.S.C.A.; (a copy of the

indictment is attached to the Petition as Exhibit "B"); the indictment was duly filed in said Court and in due course Petitioner was arraigned and pleaded not guilty; on May 2, 1945 Petitioner was tried to a jury before United States District Judge Mortimer S. Byers of said Court; the jury rendered a verdict of guilty after due consideration and on May 7, 1945 Petitioner was sentenced to be confined for a period of three and one-half years in an institution designated by the Attorney General; Petitioner is presently incarcerated in the Federal Correctional Institution at Danbury, Connecticut, by your Respondent, pursuant to said judgment of the United States District Court for the Southern District of New York. Respondent alleges that all proceedings were constitutional and valid and Petitioner's legal rights were considered and protected at all times; in accordance with the Fifth Amendment to the United States Constitution.

WHEREFORE, Respondent prays that the Writ of Habeas Corpus be quashed and the Petitioner be remanded to the custody of the Respondent for the serving of his sentence, according to law.

Dated at Hartford, Connecticut, this 6th day of March, 1946.

Respondent, M. L. Kennedy
Warden, Federal Correctional Institution
Danbury, Connecticut

Adrian W. Maher
By Adrian W. Maher
United States Attorney

Valentine J. Sacco.
By Valentine J. Sacco
Assistant United States Attorney

Supplemental Return of Respondent M. L. Kennedy

[Filed March 16, 1946]

The Respondent herein, M. L. KENNEDY, Warden, Federal Correctional Institution, Danbury, Connecticut, appearing herein by Adrian W. Maher, United States Attorney, and Valentine J. Sacco, Assistant United States Attorney, in and for the District of Connecticut, hereby files a Supplemental Return in further answer to the Writ of Habeas Corpus issued by this Honorable Court and respectfully alleges as follows:

A. In the event that this Honorable Court rules that the judgment of the United States District Court for the Southern District of New York on May 7, 1945, sentencing Petitioner to imprisonment for a period of three and one-half years in an institution designated by the Attorney General of the United States, is open to collateral attack in this proceeding, even though the statutory period for appeal of such judgment has long since expired, your Respondent hereby alleges and avers that the following are the true facts concerning the Petitioner as revealed in the Selective Service file of Local Board No. 254, located at Jackson Heights, New York. (Said Local Board file will be offered in evidence in the event this Honorable Court rules that the aforementioned judgment is open to collateral attack in this proceeding.)

1. Kulick registerd on June 30, 1942, giving his age as 19.

2. Kulick executed his Selective Service Questionnaire on December 5, 1942. He gave his age as 19. He stated he had four years of elementary school and eight years of high school, and that he had no other schooling. He stated that he worked on radio apparatus from 1941 to 1942. He stated his present occupation was a Jehovah's Witness minister, having been ordained in 1939.

Kulick attached a statement to his questionnaire and

claimed exemption from all service as a minister of religion. He also attached a photostatic copy of a statement from the Watchtower Bible and Tract Society, Incorporated, showing that he had become a "pioneer" on July 1, 1942, the day after he registered.

Kulick did not claim to be a conscientious objector in his questionnaire.

3. By letter dated December 31, 1942, the Local Board was advised that Kulick's name was not on the list of "pioneers".

4. On January 5, 1942, the Local Board placed in Kulick's file a copy of Opinion No. 14 of the Director of Selective Service, as amended November 2, 1942.

5. On February 4, 1943, Kulick wrote a letter to his Local Board calling attention to Opinion 14.

6. On March 29, 1943, the Local Board classified Kulick in Class I-A. (See back of Questionnaire).

7. By letter dated April 3, 1943, Kulick requested a personal appearance before the Local Board.

8. On April 6, 1943, Kulick presented to the Local Board four statements from other Jehovah's Witnesses. One was from Fred Severud, described as a "Company Servant". He said that Kulick went "from house to house with his Bible and information pertaining to the Bible and, also, phonographic Lectures". Another was from E. Chrysomalis, described as a "Unit Servant", saying that Kulick had been a minister from 1939. Another was from William K. Jackson, described as a "fully ordained minister" of Jehovah's Witnesses. He said Kulick became a "pioneer" in 1940. Another was by Leo Buczek, described as a member of the "Bethel Family" of Jehovah's Witnesses and a "Unit Servant". He said Kulick became a minister in 1939.

9. On April 28, 1943, the Local Board classified Kulick in Class IV-D. (See back of Questionnaire).

10. On August 23, 1944, the Local Board received word

from another Local Board that a mother with three sons in the service and a neighbor of Kulick had complained about Kulick's status. It was reported that Kulick spends most of his time around his home, "when he isn't posing at times in uniform". (See memo in file).

11. On August 23, 1944, the Local Board classified Kulick in Class I-A. (See back of Questionnaire).

12. By letter dated August 26, 1944, Kulick requested a personal appearance before the Local Board.

13. On August 30, 1944, Kulick was given a personal appearance before three members of the Local Board and the Government Appeal Agent. He presented his own written statement and also a written statement by Roland E. Davis, described as "Assistant Company Servant". Davis said that Kulick had been a "pioneer" since "early 1941" and "during this time he has spent at least 150 hours each month preaching the gospel of God's Kingdom by calling upon the people with Bibles and Bible helps in the form of books, booklets and recorded talks on Bible subjects." Davis made no mention of any other employment or work by Kulick since "early 1941".

It was brought out at this hearing that Kulick was in fact serving as a photographer's model. The Local Board also had before it the fact that Kulick worked for R.C.A. in 1941 and until June, 1942, when he became liable for service. (See note in file).

14. Following the hearing on August 30, 1944, the Local Board classified Kulick in Class I-A. (See back of Questionnaire). Kulick appealed his classification to the Board of Appeal.

15. On September 8, 1944, Kulick furnished a written statement in support of his appeal.

16. On September 28, 1944, the Board of Appeal classified Kulick in Class I-A by a vote of 4 to 0.

17. On October 11, 1944, Kulick was given a further

hearing by the Local Board, but his classification was not reopened.

18. On October 19, 1944, Kulick wrote to the Director of Selective Service, claiming he had been unjustly classified. However, the Director did not appeal the classification to the President.

19. On November 1, 1944, the Local Board again considered Kulick's claim and decided against reopening his classification.

B. In the event that this Honorable Court rules that said judgment of conviction is open to collateral attack in this proceeding, the full transcript of testimony taken in the criminal trial of the United States v. John Myron Kulick in the District Court for the Southern District of New York on May 2, 1945, will be offered in evidence by the Respondent, and said transcript is hereby made a part of this return by reference.

WHEREFORE, Respondent prays that the writ of habeas corpus be quashed and that the Petitioner be remanded to the custody of the Respondent for the serving of his sentence according to law.

Dated at Hartford, Connecticut, this day of March, 1946.

M. L. KENNEDY, Warden, Federal Correctional Institution, Danbury, Connecticut,

Respondent

By Adrian W. Maher
United States Attorney
By Valentine J. Sacco
Assistant United States Attorney.

Transcript of Hearing on Writ

[EXCERPTS]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
#1671, Criminal

WRIT OF HABEAS CORPUS

March 2[illegible]

JOHN MYRON [illegible] *Petitioner*

v.

M. L. KENNEDY, WARDEN
Danbury Correctional Institution
Respondent

Before HONORABLE CARROLL C. HINCKS,
District Judge.

Appearances:
For the Petitioner
HAYDEN COVINGTON, ESQ.
117 Adams Street
Brooklyn, N. Y.

For the Respondent
ADRIAN W. MAHER, ESQ.
U. S. Attorney
VALENTINE J. SACCO, ESQ.
Assistant U. S. Attorney

MR. COVINGTON: If your Honor please, this case presents to the Court the question of whether or not one who has been indicted under the Selective Service Act and charged with the offense of refusing to report for induction—refusal to submit to induction rather—can defend the indictment, and that if the denial of that defense upon trial

is made, whether or not that denial constitutes a denial of due process of law so as to make the judgment and commitment void and subject to collateral attack.

In this case, John Myron Kulick was classified by his Board as liable for training and service. He completed the selective process by reporting at the induction station and undergoing the physical examination at the Army Forces Induction Station, and at the close of that refusing to submit to induction. He was indicted in the United States District Court for the Southern District of New York, he was tried, and I represented him upon that trial. In defense to the indictment, I contended before the trial judge that this man had completed his administrative remedies and was in a position to challenge the validity of the order that commanded him to submit to induction.

Upon the trial, we offered to prove and show that this man was exempt from all training and service as a minister of religion, and upon the trial all the Draft Board records were offered, a number of which were received, a number of which were excluded. But in any event, when the case was submitted to the jury, the trial judge over objection and exception, in effect struck out all the evidence in reference to the Draft Board's classification and the validity of the order, and confined the issue to the question of whether or not this man actually submitted to induction, which the undisputed evidence showed that he had not. It was necessary for him to go to that point and refuse to submit in order to complete his remedies so as to qualify to make his defense. Exceptions were taken to these rulings on the ground that there was a denial of his right to due process of law and certain requested instructions were submitted to the Court raising these various issues and they likewise were refused and exceptions to those refusals were taken.

Mr. Kulick was then sentenced by Judge Byers to three years in the Federal Institution. He was committed at Danbury. No appeal was taken from that judgment of the

conviction. We take the position now that the fact alleged in the petition, no cause of action has been shown, and that if we were successful in proving the allegations made, that this man should be discharged from custody on the ground that Judge Byers denied him a fair trial and denied him the right to a full and fair hearing, and that Judge Byers' conduct was such—of such a nature as to oust the District Court of judisdiction to impose sentence; that the judgment and conviction is void and subject to collateral attack, and that these questions thus presented upon the petition and the Writ of Habeas Corpus are not such questions that are confined to appeal but that they can be inquired into and considered by the Court sitting as a Habeas Corpus Court to determine the validity of this conviction and judgment.

MR. SACCO: The Government takes this position, your Honor, as set out in the Government's return for the respondent. This defendant is legally restrained of his liberty by virtue, as Mr. Covington has pointed out, of a judgment of conviction of the Southern District of New York and a commitment based upon that judgment. The term that he was sentenced to was three and a half years—

MR. COVINGTON: That is not so. Three years.

MR. SACCO: Three years, as Mr. Covington has pointed out. This judgment of conviction was entered, as I stated, in the Southern District of New York, on May 7, 1945, and on the commitment Mr. Kulick was incarcerated in the Danbury Federal Correctional Institution where he is at the present.

Now, behind that judgment and behind that conviction, the Government claims that all the proceedings were valid, that this was a valid and true indictment returned by the Grand Jury for the Southern District; that on presentation of this defendant in court where he was represented by counsel, there was a plea entered, a plea of Not Guilty, that a trial followed, that a jury was impanelled, that he

was represented by counsel at each and every stage of the proceedings, that a full trial and a fair hearing was held. The jury verdict of Guilty was rendered, and on that verdict of Guilty the judge duly imposed sentence and a commitment was issued.

Now, the Government in its first return takes the position that this judgment of the Southern District Court of New York is not open to collateral attack in these proceedings by Habeas Corpus for this reason, and I believe it to be a sound reason: By Mr. Covington's admission, no appeal was taken from the judgment of conviction in the Southern District, therefore petitioner through his counsel has slept on those appeal rights. In fact, he has waived them by not taking that appeal within the statutory period. Having done so he cannot now at a later time come in by Habeas Corpus and attempt to substitute the Writ of Habeas Corpus for a Writ of Error or for an appeal. The Statutory period of appeal, the Supreme Court has decided time and time again—

THE COURT: I don't believe that there is any dispute about that, Mr. Sacco. If all that were involved was a claim of error in the trial judge, I don't believe that Mr. Covington, as I understood him, that he would reach that error in a writ. I don't think that you are at issue there. As I understood his presentation, he claimed that there was such a denial of due process that the trial court was without jurisdiction. Isn't that the only issue?

MR. COVINGTON: That is the only issue presented here.

THE COURT: So I don't think you need to argue the other point.

MR. SACCO: Well, the reason I mentioned it, your Honor is this: That we are at issue on the interpretation of what is denial of due process. Now, Mr. Covington has made some statement as to what has gone on in the South-

ern District of New York. We are prepared here to make a full record for your Honor's consideration.

MR. COVINGTON: Why don't you do that now? I might say this, your Honor, that although the prisoner is here there is nothing that he can testify to that can be added to the record, and, therefore I will consent to the introduction of the transcript of the proceedings as well as the exhibits thereto that Mr. Sacco has.

MR. SACCO: Very well.

MR. COVINGTON: And let that be the record upon which this Writ can be disposed of.

THE COURT: Will you describe a little more fully what Mr. Covington refers to as the transcript of the proceedings.

MR. SACCO: Yes, your Honor.

What Mr. Covington refers to is the transcript of the testimony of the trial which was held in the Southern District of New York on May 2nd and 3rd, and the proceedings relative to sentence on May 7th, 1945. The Government has the stenographer's minutes, the full transcript of the testimony, and is prepared to offer them in evidence.

I do, however, before being shut off by Mr. Covington, wish to make the Government's position clear on the record, and that is this: We do believe that what Mr. Covington is seeking to attack is not a procedural due process error, and it is not sufficient for Mr. Covington to get up in this courtroom and say, "Well, what Judge Byers did below is a violation of due process." I think what Judge Byers did below, the Government's position is that it is a procedural error at best, and the transcript of the testimony which is at best—which is being offered and will be before your Honor, is the best evidence as to whether or not it was due process error or a procedural error which should have been taken advantage of by an appeal. But because the Government is only too glad to submit this case on its merit, and because the Government feels and we think the record

supports us that this petitioner was offered a full and fair hearing and a fair trial and hearing in the court below, we want to have the full record before your Honor, and we are offering this transcript of the testimony.

(The transcript referred to was received in evidence and marked as Exhibit 1.)

As I get Mr. Covington's position, and I think the analogy to a pyramid is most apt, he, by successive stages of constitutional attack finally gets down to the foot of the pyramid, and that is the Judge's Charge to the jury. He first says the petitioner is illegally restrained by the commitment. Well then, behind the commitment is the judgment. He says that judgment is invalid, and then the trial is invalid, or behind the trial are certain offers of evidence in the conduct of the hearing. He says that is invalid.

Now, we are prepared to present to the Court, and as a part of the record here, the full Selective Service File of this petitioner, which contains all of the documents which were before the Local Board for the determination and the classification of this petitioner. Because, as Mr. Covington's petition sets out, this Local Board acted illegally. Well, we are prepared to show by the admission of this full and complete file which contains a complete transcript of all the proceedings, that they acted fairly, judicially, and gave this man many hearings in which he had personal appearances; that he took an appeal to the Appeal Board; that the Appeal Board by a 4-0 vote sustained the Local Board; that it received all the documents he submitted, and then in addition to that, as the transcript of evidence will show, Mr. Covington, upon trial of this case offered in evidence all the pertinent documents from this Selective Service File, and he said some were admitted and some were excluded. Well, by my computation Exhibit A through O were admitted, with the exception of only document C which is some letter which was submitted for

identification and then it was agreed by both Mr. Covington and the Assistant United States Attorney who tried the case that the exhibit be excluded. So I think it should be clear in the record that all of the documents which were offered by Mr. Covington were admitted in evidence from this Selective Service File, and were in fact in evidence before the jury in his trial. I will offer the Selective Service File, Mr. Covington, as Exhibit 2.

MR. COVINGTON: I would have no objection. Is it all there?

MR. SACCO: Well, I am offering it to you.

MR. COVINGTON: Well, let me take a look at it first. Well, we have no objection.

THE COURT: It may be received.

(The file referred to was received in evidence and marked as Exhibit 2.)

MR. SACCO: The Government, therefore, wishes to submit this case and get the whole case with its merits before your Honor. Our position, as I stated in the supplemental return, is that we do not have here a due process error but a procedural error in the erroneous charge. Our claim is that that should have been taken care of by appeal within the statutory period; that if Mr. Covington had followed the steps of counsel in the case of United States vs. *Estep* and *United States* vs. *Smith* that he could have obtained a reversal either by the Circuit Court of Appeals or the Supreme Court of the United States. Having failed to do so, he cannot convert this Writ of Habeas Corpus into a Writ of Error, but because we are confident of our position on the merits we are submitting the transcript and the full Selective Service File.

Briefly, I would like to point out that in our supplemental return the Government makes return to the effect that if your Honor feels that there is ground for a collateral attack and that you should go into merits of the case, we have set out a synopsis of the happenings before the Local

Board. We have shown in the supplemental return the classifications which were received by this petitioner. We have shown that he claimed that he was a duly ordained minister of religion at the age of nineteen. In fact, he claimed that his occupation as a Jehovah's Witness Minister began in 1939 when he was only sixteen years of age. He has shown that he submitted documents which were considered by his Local Board, and that on March 29th, '43 he received a 1-A classification. He then requested personal appearance before the board, submitted affidavits, and as a result of that personal appearance and affidavits he was given a 4-D classification.

Due to complaints which were received by the local board, and the complaint is in the file, the local board then learned that Mr. Kulick rather than spending his full time as a Jehovah's Witness and as a minister, was actually employed as a model. He was therefore brought before the local board, or he was first given a 1-A classification, and then three days later he was given another personal appearance before his local board, and at that hearing it was brought out that he was engaged in this occupation as a model, and it was as a result of that testimony that the local board continued him in 1-A classification.

He took an appeal from that 1-A classification and the appeal board upheld the finding of the local board, continued him in 1-A classification by 4-0.

In November of 1944 he was then given his order to report for induction. He did so report. He got to the induction station, went through the routine physical examination, and was found to be acceptable. He then came to the last point of the induction ceremony which was the taking forward to be formally inducted when he refused to take that step and refused to submit to induction, and for that refusal he was duly indicted, tried, convicted, and sentenced.

Now, we are content as I stated before to submit this local board file and the transcript of testimony to show

that he in fact had all his constitutional rights. In fact, they were zealously guarded at every step, considered his personal appearance before the board; he was heard on two occasions, an appeal was taken, and he was given more than his full share of constitutional due process hearing.

Now, we come to the trial. As I said before, Mr. Covington submitted all the documents. What he takes issue with is Judge Byers' charge to the jury. Well, at the time that Judge Byers made that charge to the jury, what Judge Byers charged was good law. The Supreme Court had not yet decided the Estep Case which I will go into in a minute. Therefore, so far as Judge Byers' charge is concerned, he charged the jury on the state of the law at that present point. Now, Mr. Covington, with the help of hindsight and with the help of the late Supreme Court decision, is coming into this Court and saying that no only was the trial unfair but that Judge Byers ousted hi nself of jurisdiction by an erroneous charge to the jury, and I ask Mr. Covington to submit one case to your Honor where an erroneous charge to the jury can be held to oust the court of jurisdiction. That to me is a far-fetched proposition, and it is easy to come in here and say that such and such is a constitutional violation and a due process violation, and open to collateral attack. There was no deprivation of his constitutional rights insofar as I can see.

In his brief, Mr. Covington points out various cases where the Supreme Court has on Habeas Corpus gone outside the record and reached in and said that the Writ of Habeas Corpus will attack certain error which were not taken advantage of in the appeal, but the mere listing of that type of error is sufficient to show that it doesn't reach the case at bar. The cases that Mr. Covington cites are cases where there are denial of plea of former jeopardy, erroneous confession, a domination of trial by mob violence, a trial by information instead of by indictment of a felony, and denial of trial by jury, and illegally forcing and ob-

taining of trial by jury, and illegally forcing and obtaining a plea of Guilty, and certainly Mr. Covington has not a claim that will in any way be comparable to the charge here.

* * * *

In addition to those two exhibits, the Government would also like to offer in evidence the 1943 year book of Jehovah's Witnesses—

MR. COVINGTON: I have no objection.

(The book referred to was received in evidence and marked as Exhibit 3.)

MR. SACCO: The purpose of submitting that in evidence is this: The Selective Service Rules and Regulations provide that the local board and appeal board can consider with reference to any one case documents of general note and general importance that refer to the particular case at hand. We claim that this is relevant on the ground that the pioneers so-called in the field of Jehovah's Witnesses are listed in this book, and among that list of pioneers the name of John Myron Kulick the petitioner does not appear. In addition to that in the pamphlet Consolation which is a part of the Selective Service File also has a list of pioneers, and the Bethel Family and other original group of Jehovah's Witnesses, and Mr. Kulick's name does not appear there.

It is also the Government's contention that the petitioner is legally imprisoned and given a fair and full trial and duly convicted, and stands incarcerated today on a valid commitment, and that your Honor should discharge the Writ of Habeas Corpus and remand him to the custody of the Warden.

* * * *

MR. SACCO: May I say just one word. I think Mr. Covington is in error and we may as well correct him for the record when he stated that Mr. Kulick had terminated

his position with General Electric, RCA, three or four months prior to registration. I believe the file will show that he worked for RCA or General Electric, down to June, 1942, and that he in fact registered with Selective Service in June the same month.

MR. COVINGTON: That's right. He told them some months before. He informed the General Electric that he was going to quit but he actually didn't quit until one month before he registered. That is correct, and I am sorry for that; it was a slip of the tongue.

• • •

I want to read this transcript to you and I want to get this copy of these exceptions that I took to Judge Byers charge and put it in this record because it should have been in this transcript:

"MR. COVINGTON: May I have the privilege of making my exceptions in the absence of the jury?

THE COURT: Just write them out and I will read them." Then I stated I would like to state them orally but not in the presence of the jury. "I would like to have you write them out," the Court said. My notes on the record defendant's request to charge 1 to 44 has been examined and declined, so I would like to see if I can't find those written exceptions that are mentioned here and file them with you because I objected to this charge on the ground that we were denied due process of law, the way he submitted the case to the jury.

THE COURT: If you think they are material evidence at this hearing, why aren't they here, Mr. Covington?

MR. COVINGTON: Well, they told me that they were going to have the transcript of the testimony here; I mean all the proceedings, and I thought my exceptions would be in the transcript like they are in every transcript, but I examined them and found they are not. For the first time I have had an opportunity to see it.

THE COURT: Is there any objection then in keeping the record open, say for a week, to enable Mr. Covington to file his requests?

MR. SACCO: No, your Honor, the Government will be glad.

THE COURT: Will a week suffice for your purpose?

MR. COVINGTON: That will be fine.

THE COURT: Will it be agreeable to waive further attendance of counsel and agree that a certified copy may be mailed direct to the clerk of this Court supplementing the transcript?

MR. SACCO: Yes, your Honor. Except that on behalf of the Government I would like to see those.

MR. COVINGTON: I will mail you a copy of them and then mail it to the clerk directly.

* * *

MR. SACCO: There is one thing further that should be stated for the record. When you refer to the striking out of exhibits by Judge Byers, my reading of the record fails to reveal any formal striking out.

MR. COVINGTON: There was no formal striking. My point was that the effect of the Judge's order was to strike all that evidence out from the record because he refused to let the jury consider it.

MR. SACCO: No formal striking?

MR. COVINGTON: No formal striking, no.

THE COURT: I think, Mr. Sacco, if you will agree where the dividing line is between a mere error and what Mr. Covington calls a vital lack of due process, it will be helpful.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 1671, Civil

JOHN MYRON KULICK, Petitioner
vs.
M. L. KENNEDY, WARDEN

Danbury Correctional Institution, Respondent

COUNTY OF NEW HAVEN
City of New Haven
STATE OF CONNECTICUT, ss July 10, 1946

I hereby certify that the within and foregoing is a true and correct transcript of all the oral evidence on the trial of the above entitled cause.

Benjamin R. Sanders
Official Reporter

Stipulation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 119/62 Criminal

UNITED STATES OF AMERICA
v.
JOHN MYRON KULICK, Defendant

It is hereby stipulated that defendant's attached written exceptions to the court's charge, which were made, considered and ordered filed upon the trial on May 3, 1945, and which were not filed or incorporated in the stenographer's transcript of the proceedings because they were mislaid, may now be filed with the Clerk of the Court and made a part of the record in this case.

Dated April 10, 1946.

John F. X. McGohey
United States Attorney

Hayden C. Covington
Attorney for Defendant

EXCEPTIONS

Exception is taken to that part of the court's charge where, in the beginning of the charge, the court told the jury that it may strike you as idle why a jury is called upon to pass upon a question that is not contested, and containing down to where the court said that if a man does not plead guilty he is entitled to a jury trial on a plea of not guilty, which charge is excepted to because it charges the jury to convict the defendant.

Exception is taken to that portion of the charge where the court stated in substance that many things had been said

in the presentation of the case and "this morning", which were deliberately made to divert you from duties, which charge is excepted to because it is prejudicial to the rights of the defendant and deprives him of the right to representation by counsel and the right to a trial by jury on the issues of whether or not he is guilty.

Exception is taken to that part of the court's charge beginning with the statement made in substance that as the court told you from the outset the jury was not to pass upon or review the action of the draft boards and that the jury were not to pass upon the judgment of the draft boards, and ending with the statement in substance that it is not for you to decide whether the defendant was illegally or improperly classified, treated or dealt with. This portion of the charge is excepted to because it denies the defendant his right to have the jury pass upon whether he had a duty under the Act and whether the board acted illegally, arbitrarily and deprived him of his constitutional rights. That portion of the charge has construed the statute in an unlawful and unconstitutional manner and deprives defendant of his constitutional rights for each of the reasons and in the manner shown in the attached Exhibit A.

Exception is taken to that portion of the charge where the court told the jury it was not to determine whether he was illegally treated but that the jury were to decide only whether the defendant submitted to induction; and to that portion of the charge where the court told the jury that it had been decided by other courts in cases under the Act and in cases involving other persons of this sect that the court and jury could not decide but the one question which was whether the defendant complied with the order for each of the reasons set forth in Exhibit A attached and because this charge deprives him of his right to a trial by a jury upon the particular facts of this case and because other Jehovah's witnesses have been convicted under the Act is entirely immaterial, prejudicial and deprives him

of his right to a fair and full hearing on the issue of his guilt by the jury and thus abridges him of his right of a trial by jury contrary to the Constitution.

Exception is taken to that portion of the court's charge where it is said that, in substance, if an army were to be raised subject to the action of a court and jury in the case of a young man who wants others to do his fighting, etc., and ending with the statement you can understand in what position the United States would be in, which charge is prejudicial and inflammatory, telling the jury that the court is of the opinion that the defendant is a draft evader and wants others to do his fighting, thus instructing the jury to convict the defendant, which deprives the defendant of the right of trial by jury, and it is excepted to for the reasons shown in Exhibit A attached hereto.

Exception is taken to that part of the charge where the court told the jury that it could understand the system of the Selective Service law and why it would be impossible to raise an army if the jury and court could determine whether a man should or should not be inducted into the armed forces under the Act because of each of the foregoing reasons and the grounds stated in Exhibit A, attached hereto.

Exception is taken to that part of the court's charge and the latter part thereof where the court said to the jury that it was no part of your job to decide whether the boards acted illegally, etc., and ending with the statement that the only question for you to decide is whether the defendant failed to submit to induction, which charge deprives the defendant of the right of a trial by jury, instructs the jury to convict and deprives the defendant of a judicial trial of the issue of whether he has no duty because exempt and not liable under the Act and because it unduly limits the issue and also on the grounds shown in Appendix A attached hereto.

Exception is taken to that part of the court's charge

where he discusses the defendant's testimony and says that upon the defendant's testimony he admitted he willfully and unlawfully failed to report and there was therefore very little if anything to decide which is an instruction to find the defendant guilty, denies him of the right of trial by jury, and is an invasion of the province of the jury in a criminal case.

Defendant objects and excepts to the charge as a whole because it fails to charge as requested in the Defendant's Requested Instructions Nos. 1 to 29, inclusive.

EXHIBIT "A"

The criminal sanction clause of section 11 of the Selective Training and Service Act of 1940, and regulations thereunder, requiring defendant to comply with the order to submit to induction into the Armed Forces of the United States, have been construed by the courts so as to require the defendant (who has been examined on a preinduction physical examination and declared acceptable and who has exhausted his administrative remedies by complying with and submitting to the selective process which was completed before the order to report for induction was issued, and who thereafter reports for induction but who refused to submit to induction at the Army Reception Center) as a condition precedent to testing the invalidity of the classification, to submit to induction pursuant to the illegal order upon which the indictment is based, a vain and needless thing or act.

The construction of the Act and Regulations penalizes the defendant for having failed to submit to induction by denying him the right to show that the order is invalid because of defendant's exemption from duty under the Act as a minister of religion, thus making the said Act and Regulations thereunder unconstitutional and void for each of the following reasons, to wit:

(a) They constitute a bill of attainder, contrary to clause 3 in section 9 of Article I of the Federal Constitution.

(b) They transfer and surrender the judicial power of the United States Courts to the draft boards, in the trial of a criminal case, so as to permit said boards to determine the guilt of the defendant, a judicial function, contrary to Article III of the Federal Constitution.

(c) They abridge the right of the defendant to have a judicial trial and deny him the right to prove his innocence; and also his right to be heard in his defense, contrary to the due process clause of the Fifth Amendment to the Federal Constitution.

(d) They deny and abridge the right of the defendant to a trial by jury and the privilege of having a jury pass on whether the defendant owes a duty because exempt and whether he is guilty of failing to perform a duty, contrary to the provisions of the Federal Constitution guaranteeing a trial by jury and to the Sixth Amendment forbidding the denial thereof.

(e) They permit conviction without evidence, and deny the defendant the right of counsel in his defense, contrary to the Fifth and Sixth Amendment to the Federal Constitution.

(f) They permit the draft boards to determine the guilt of defendant who is exempt and could not be found guilty of violating a duty under the Act, and thereby the Act and Regulations are converted into an *ex post facto* law, contrary to Clause 3 in Section 9 of Article I of the Federal Constitution.

Memorandum of Decision

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF CONNECTICUT
No. 1671 Civil

UNITED STATES ex rel.
JOHN MYRON KULICK,
v.
M. L. KENNEDY, Warden

The petitioner herein, after conviction in May, 1945, on a verdict of guilty in the United States District Court for the Southern District of New York, for an alleged violation of the Selective Service Act, was sentenced to serve a term of three and a half years under the custody of the Attorney General. From this judgment no appeal was taken. Being now confined under the authority of that judgment in the Federal Correctional Institution at Danbury in this District, he has addressed a petition for a writ of habeas corpus to this court. The writ issued as prayed and after due return by the warden named as the respondent therein the parties have been fully heard.

The petitioner asserts that contrary to the Constitution he was denied due process of law first by the Selective Service System in connection with his classification and thereafter by the court at the trial which resulted in his conviction; as a result of this claimed denial he contends that the judgment of the court on the authority of which he is now concededly detained was a nullity for lack of requisite jurisdiction, and hence open to collateral attack in this proceeding.

However, the petitioner failed to appeal from said judgment and since concededly all the rulings of the trial court of which petitioner now bitterly complains could have been raised by an appeal seasonably taken, the Govern-

ment contends that the judgment of the New York court is subject neither to attack nor review here. Thus the first question for determination here is whether this court on the pending petition has the power and duty to consider and adjudge whether the judgment of conviction, entered in a sister court, which on its face has all the attributes of a valid judgment is in truth a nullity since dependent upon some violation of the petitioner's constitutional rights.

Where, as here, the trial court had jurisdiction over the subject-matter and over the defendant's person any claim of error appearing in the proceedings—even error involving the denial of a constitutional right—ordinarily can be raised only through the appellate process and a failure to appeal is an effective waiver of the claim. However, a writ of habeas corpus will issue on a petition alleging facts which show that the apparent waiver was induced by fraud, coercion or ignorance of legal rights and if after hearing such allegations are found sufficiently sustained, the apparent waiver will be treated as ineffectual. *Walker* v. *Johnson*, 312 U. S. 275; *Johnson* v. *Zerbst*, 304 U. S. 485; *U. S. ex rel. McCann* v. *Adams*, 320 U. S. 220. In such cases, as also on petitions alleging jurisdictional objections had not been correctly dealt with by a trial court; *Bowen v. Johnston*, 306 U. S. 19, a court in habeas corpus proceedings will after examination afford protection to such rights as may be found infringed.

This, to be sure, is not a case like those just cited, in which an appeal was waived or frustrated because of lack of competent counsel. The petitioner here was represented on his trial by the same counsel who is now vigorously pressing this petition. I hold, however, that the failure to appeal from the judgment of conviction may not be taken as an effective waiver of a constitutional right because the state of the law at the time of the trial was such that not even competent counsel could then have foreseen the utility of an appeal.

This was so because the charge upon which the petitioner was indicted and convicted was not that of having willfully failed to report for induction pursuant to an order of his local board. If such had been the charge, under the doctrine of *Falbo* v. *U. S.*, 320 U. S. 529, decided in January, 1944, the petitioner, on the theory that he had failed to comply with an administrative order valid on its face, would not have been entitled to interpose as a defense the claimed invalidity of the administrative order and not until he had complied with the administrative order would he have been entitled to a review of its validity on habeas corpus proceedings. Here concededly the petitioner, physically at least, had reported for induction but after acceptance by the induction authorities had refused to submit to induction. Thus the case here fell within the scope of the rule of *Estep* v. *United States* and *Smith* v. *United States*, decisions made upon an opinion of the Supreme Court announced in February, 1946. Under this opinion the petitioner who had reported but refused to submit to induction was entitled to defend on the ground that the Selective Service Agencies in classifying him as 1-A, had acted without any foundation of fact, or arbitrarily and capriciously.

At the time of the trial in May, 1945, the rule of *U. S.* v. *Flakowicz*, 146 F. 2d 874, a Second Circuit case in which the defendant there was also represented by petitioner's counsel here, appeared to be controlling and a writ of certiorari from that decision had already been denied. 325 U. S. 851. And, as was pointed out in Mr. Justice Frankfurter's concurring opinion in the *Estep* case, the right to interpose as a defense in a criminal action such as this a claimed denial of due process by the Selective Service Agencies had been overruled by the Courts of Appeal in seven other circuits with more than forty appellate judges concurring. To be sure, petitioner's counsel, who also represented Estep and Smith, had applied for a writ

of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit reported in 150 F. 2d 768. But it was not until October, 1945, that this writ was granted. Consequently, and especially in view of the earlier denial of certiorari in the *Flakowicz* case, while Kulick's right of appeal was still alive, his counsel, though still persisting in his prosecution of an appeal in the *Estep* case, had had scant ground to believe that an appeal in the Second Circuit would serve any useful purpose whatever.

In this situation, I think the petitioner should not be penalized because his counsel failed to foresee that widely prevalent doctrine apparently firmly settled would be upset and hence failed to appeal in his behalf. I think him entitled now in these proceedings to a judicial ascertainment of his constitutional rights and appropriate relief from any invasion of those rights which may be found.

In this aspect the case here resembles *Bowen* v. *Johnston*, 306 U. S. 19. There the court pointed out that the rule of review only through the appellate process "is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." And it held that a state of existing "uncertainty and confusion with respect to a question whether" certain offenses were triable in the state or federal courts was an "exceptional circumstance" which warranted a relaxation of the rule of review only by appeal (Page 27).

Here, I think, the reversal of doctrine accomplished by the *Estep* opinion was an "exceptional circumstance" which justified resort to remedies now available only on a writ of habeas corpus. Whether under that circumstance some violation of a constitutional right resulted can be determined only if I look behind the judgment. I therefore address myself to that task.

From the petitioner's file with the Selective Service System which in its entirety has been received into the

record here, from the complete transcript of his trial in the New York court which has also been received in evidence here, and from the evidence originally received at the hearing here on the issues raised by the petition for the writ, I make the following

FINDINGS OF FACT

1 The petitioner was born June 17, 1923. After godly upbringing by parents who are members of the sect known as Jehovah's Witnesses and extensive religious training in his childhood under the direction of the Watch Tower Bible and Tract Society which is the legal corporation which underlies the membership of that sect, the petitioner decided in December, 1939, to devote his entire life to the Lord as His witness. At that time, when aged 16, he was baptized and from that time has considered himself as an ordained minister of the sect, not by virtue of any ceremony, ritual, or official appointment as such—of which indeed there was no evidence—but by virtue of his self-dedication and his subsequent acts. He was then in his third year in high school. At the close of that school year he entered upon what he called "full time pioneer activity" for about four months. Under the practice of the sect, a "pioneer" was required to devote a minimum of 150 hours of service monthly to the religious work of the sect.

2. Thereafter, in October 1940, he returned to complete his high school course. At the same time for about a year he attended a private commercial school two evenings a week so he "could apply for a well-paid job". In August 1941, he sought and obtained full-time employment with R.C.A. Communications. This continued until July 3, 1942, requiring his attendance for five to six and a half days per week. To secure this employment he falsely represented (1) that he was two years older than his actual age and (2) that he had been employed for three years by three specified employers. There was, however, no evidence that

these false representations were known to the local board at least until after the petitioner had been finally classified.

3. He registered with local board 254 on June 30, 1942. After the termination of his employment with R.C.A., just after his registration, so far as was shown by the evidence before the local board, he devoted 150 hours monthly to his ministerial work until his arrest.

4. On March 29, 1943, he was classified as 1-A but on April 28, 1943, was reclassified as IV-D. In August 1944, he was reclassified as 1-A. Beginning in August 1943 he had supported himself by serving as a professional model posing in U.S. Army uniform at a minimum compensation of $7.50 per hour. According to the petitioner's testimony given to the trial court, this employment, which continued to the time of his trial, averaged only two hours a week and he so informed the local board. However, a member of the draft board called by the government at the trial in the New York court testified that at a Board hearing accorded the petitioner on August 30, 1944, "We asked him, as I recall, how much time he gave to his ministerial duties and the time he gave and the time he spent in making his livelihood did not jibe, so we concluded that most of his time was spent working as a professional model and very little time given to his duties as a minister." The petitioner's testimony at this hearing of the board was not reduced to writing other than by a minute recorded on his questionnaire which reads: "When registrant appeared it was learned after interrogation that he was an artist model—and has been photographed in military uniform: when further question C. O. (sic) in military uniform his reply was evasive." No corroboration from his commercial employer or from any other source of the contention that the petitioner's employment as a model was restricted to an average of two hours weekly was offered to the draft board, and although in my view the fact is irrelevant for present purposes, it may be noted that no corroborative

evidence on the point was offered to the trial court or to this court at his hearing on the writ. At his trial, he admitted that in November, 1944, he had told an investigating agent that from his employment as a model "at times he could earn $35.00 a week" but denied having said that he had earned such a weekly sum.

5. The petitioner on trial testified that he submitted to the board no affidavits which it refused to receive and that the board received all the evidence that he offered. Indeed at the hearing above referred to the Board received a two-page typed statement by the petitioner relating to his ministerial activities but no writing relating to his commercial activities was offered.

6. After his hearing on August 30, 1944, the petitioner's classification as 1-A was continued and he was duly ordered to report for induction. Thereafter on appeal the Board of Appeal considered his case on the basis of the entire file of the local board and unanimously classified him as 1-A. By written statement appended to his notice of appeal he reviewed the evidence in the file tending to support his contentions and added that he had told the local board "that occasionally I do secular work but that this work did not interfere with my pioneer duties and requirements. In this connection I showed the board that part of the regulations applying to Pioneers, which states that 'they spend all or *substantially* all of their time in dissemination of their beliefs.' The average time that I spend doing this secular work does not exceed 2 hours for the entire week."

7. Selective Service regulations supplement the bare text of Sec. 5(d) of the Act, 50 U.S.C. App. 305, by the following:

> "(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member,

without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister."

"(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

8. By letter dated June 10, 1941, the Deputy Collector [Director] of the Selective Service System invited Hayden Covington, apparently in his capacity as Vice-President of Jehovah's Witnesses, to submit lists of several categories of persons associating with Jehovah's Witnesses. On June 12, 1941, the Selective Service System promulgated an "Opinion", Vol. 3, No. 14, in which it was stated "The unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect, and that the nature of their activities, the record kept of them, and their work places them in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions." The opinion proceeded to recite that the names of those of the sect who (Par. 3) devote their full time and effort to the manufacture and production of books, pamphlets and supplies, etc. (elsewhere referred to as the "Bethel Family"), and also members known as "pioneers" who (Par. 4) "*spend all or a substantial part of their time*" . . . in the "work of teaching the tenets of their religion and in the converting of others to their belief, and who enjoy the esteem of other Jehovah's Witnesses, are recorded in the executive office of the Watch Tower Bible and Tract Society and that "members of this group have a standing in relationship to that organization and the other

members of Jehovah's Witnesses" which brings them within the purview of Section 5(d) of the Selective Training and Service Act of 1940, and "they *may be classified in Class IV-D, providing their names appear on the certified official list of such persons transmitted to State Directors of Selective Service by National Headquarters of the Selective Service System.*" (Italics supplied)

9. On November 2, 1942, an amendment of Opinion No. 14 was promulgated which made no change in the instructions for the classification of members of the Bethel Family and pioneers except that it did add this sentence: "The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of Paragraph 5 of this Opinion." Paragraph 5 of the amended opinion reads as follows:

> "The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, *devote their time and efforts in varying degrees* to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, *whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions,* and, finally,

whether or not they are regarded by other Jehovah's Witnesses in the same manner in which *regular or duly ordained ministers of other religions are ordinarily regarded.*" (Italics supplied)

10. The name of the petitioner was at no time shown to have been included in the list of ordained ministers known either as "Bethel Family" or "pioneer" furnished National Headquarters of the Selective Service System, although the petitioner personally and through the affidavits had of associates had represented that he had been an ordained minister since 1939. Whether this list after November 2, 1942, was supplemented by subsequent additions to the membership of the Bethel Family and the pioneers does not appear in the evidence.

11. The Year Book of Jehovah's Witnesses for 1943, which was the only item of evidence originally received at the hearing on the pending writ, and which purports to cover a report for the fiscal year of 1942 and to have been copyrighted in that year, recites under the heading "Ordained": "These followers of the Lord, who have chosen to follow a course the same as He did when He was upon the earth, are ordained ministers of the gospel. A man doesn't represent God because some creature says he is God's representative. The only way anyone could determine who are ordained of God is to judge them by their works." And again,—"There are many other ordained ministers of Jehovah's witnesses whose names are not listed in this year's report, but those that are listed are specially equipped to look after their ministerial duties at the headquarters of the Watch Tower Bible and Tract Society or its branches or as traveling evangelists." Then follows lists of the Bethel Family and of the Pioneers in neither of which appeared the petitioner's name.

12. Under date of February 4, 1943, the petitioner addressed to the local board a letter calling attention to the amendment to Opinion No. 14 referred to above. On

April 3, 1943, having been recently notified of a 1-A classification, he wrote to request a personal hearing and appended to his letter a request as follows:

> "I request that you enter upon the classification record in the space provided the date you receive this request and also the date and time fixed for me to appear, and promptly mail to me notice of time and place fixed for my appearance, as provided in section XXVI, of the Selective Service Regulations."

13. On November 9, 1944, he was ordered to report for induction. He did so report and after being found acceptable for induction refused to submit to induction and his case was accordingly referred by the local board to the U. S. Attorney for criminal prosecution. On trial, he admitted to the court that when he reported he was resolved not to submit. He acted, so he testified, without legal advice and testified that he reported and submitted to examination "so that I could according to my own understanding of legal proceedings exhaust my civil remedies."

DISCUSSION AND CONCLUSIONS

The Selective Service regulations, as quoted in the foregoing findings, define a "duly ordained minister of religion" as one "who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization." It is apparent from the literature of "Jehovah's Witnesses" which is in evidence and particularly its Year Book, that the sect does not have any ceremonial ritual of ordination or any prescribed course of discipline which is recognized as a prerequisite to a sectarian classification as an "ordained minister". Judging from the literature in evidence any member of the sect who mentally resolves to consecrate himself to the teaching and preaching of its doctrines considers himself an ordained minister, and if his subsequent conduct is in harmony with that self-consecration he comes to be recog-

nized by the individual members of the sect with whom he comes into contact as an ordained minister of the sect.

Certainly there is no evidence in the case that this petitioner was ever ordained in any ceremonial ritual, and although it does appear that prior to his claimed ordination at the age of 16 his Bible study was under the direction of members of the sect there is no evidence of any course of discipline of specified content prescribed as a prerequisite to ordination to which this petitioner conformed.

The administrative definition of a "regular minister of religion" is broader. However, the definition includes recognition by a recognized sect. The definition I think implies a recognition by the sect as an organization as distinguished from recognition by individual members of the sect. This conclusion is emphasized by the apparent absence of any prescribed qualifications for membership and authentic record of the roster of members. Here, to be sure, the petitioner submitted to his draft board affidavits of several persons representing themselves to be associated with the sect in various capacities but there is a complete absence of evidence to show that these affiants have any more authority to certify to the petitioner's status than he to theirs. Thus at most the petitioner's affirmative evidence of his ministerial status consists of nothing more than an accumulation of mutually self-serving declarations.

That the regulation contemplates official, organizational, as distinguished from individual, recognition is further suggested by the arrangement noted in the findings whereby the organization was invited to supply the Selective Service Headquarters with official lists, and by the fact that is apparent from its own publications that it did maintain such lists. But the petitioner here was not included in such lists,—at least so far as the evidence discloses.

The only evidence that I find which resembles official recognition is the photostat of a certificate of the Watch Tower Bible and Tract Society, Incorporated, dated Oc-

tober 5, 1942, reciting that the petitioner was baptized in December 1939, devotes his entire time to missionary work, "has taken a course of study in the Bible and Bible helps prescribed by this Society, and has shown himself apt to preach and teach" and that "he has the scriptural ordination to preach." The certificate continues: "He is therefore declared by this Society a duly ordained minister of the gospel." This certificate is signed by J. Sullivan (if I have deciphered the signature correctly) as "Superintendent of Evangelists." There is, however, no evidence in the record as to the powers and authority of Mr. Sullivan. I notice in the Year Book, which is in evidence, a report of the meetings of the Watch Tower Bible and Tract Society (a Pennsylvania corporation) and the Board of Directors of the Watch Tower Bible and Tract Society, Inc., a New York corporation, held for the election of a President to succeed J. F. Rutherford, deceased. The report announces the unanimous election of Nathan H. Knorr as President and Hayden C. Covington as Vice-President. The Year Book also records annual meeting of the Pennsylvania corporation on October 1st, 1942, at which a resolution was adopted wherein the members "duly assembled as legal representatives of our brethren throughout the world" declared (in part):

> "(4) That for more than sixty years Jehovah has used faithful men, C. T. Russell and J. F. Rutherford, as his servants to fill the office of President, the chief executive office of the Society, to oversee the affairs of the earthly part of Jehovah's organization under direction from the Lord;
>
> "(5) All faithful servants of the Lord have recognized that The Theocracy, of which the Watch Tower Bible and Tract Society is a servant, operates from Top down, and not from the bottom up as in the worldly governments, and therefore, that instructions come to the Lord's people on earth from the office

of the president of the Watch Tower Bible and Tract Society, filled by anointed men chosen of the Lord in his organization;

"(6) We recognize before the Lord that Brother N. H. Knorr is His chosen servant to fill the office of president vacated by the passing on of Brother J. F. Rutherford to a higher office and field of service in Jehovah's organization; and that with this change in personnel in office the organization has not changed one bit, but that it has continued forward with greater speed and increase than ever before known in the history of God's earthly organization."

Whatever powers Mr. Knorr or other corporate officers may have derived from this resolution or from other sources does not otherwise appear. Still less is there evidence in the record to show authority in Mr. Sullivan to certify the classification of an ordained minister or to show what the requirements for such a certificate may be. Cf. *Ex parte Stewart*, 47 F. Supp. 415.

I thus conclude that the action of the administrative agencies did not necessarily conflict with the regulations as properly construed.

However, the opinion of the Deputy Director noted in my findings may be taken as indicating an administrative practice which sanctions some relaxation of the regulations. Cf. *Goodwin* v. *Rowe*, 49 F. Supp. 703, and *Ex parte Stewart*, supra. And this opinion clearly contemplates the propriety of a IV-D classification in certain cases in which there is no legal evidence of official recognition by the sect. The opinion makes it plain that the board was to judge each such case on its individual merit and suggests tests so broad and vague that considerable room is left for the discretion of the board. However, since the practice thus sanctioned is by way of relaxation of lawful regulations registrants who claim exemption are in no position to

charge that an administrative discretion which can operate only in their favor is illegal for its vagueness.

Turning to the content of Paragraph 5 of the Opinion, quoted above in my findings, it will be noted that one of the tests suggested is whether or not such registrants "devote their lives in furtherance of the beliefs of Jehovah's Witnesses" and "whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions." Since, under the opinion, members on the official list are deemed to come within the purview of the statutory exemption only if they "devote all or substantially all of their time" to the teachings of their sect, it is only reasonable to believe that this same requirement should be deemed incorporated in the test broadly stated in Paragraph 5, quoted just above, for alleged ministers not on the official list. The tests also fairly suggest that the continuity of full-time activity is an important factor. I quite agree with the holding in *U. S. ex rel. Hull* v. *Stalter*, 151 F. 2d 633, that the classification should be made on the basis of the registrant's status at the time of classification. I think, however, that his status at that time may depend in part, at least, upon the continuity of his previous full-time service.

Looking then to the facts of this case, we see that the petitioner's Selective Service file showed that after the petitioner at the age of 16 years came to consider himself ordained as a minister his full-time service was interrupted first by a year's attendance at high school (and as it was later developed at the trial by part-time attendance at a night trade school). Thereafter his full-time ministry was again interrupted by full-time employment for the greater part of a year as an industrial worker. After this employment terminated, on his own representations he was classified as IV-D. He was not reclassified as 1-A until, as he himself admitted, he was currently employed as a commercial model.

His secular employment being thus admitted, its extent became a proper factor in the determination of his status. *Ex parte Stewart,* supra. He offered no corroboration whatever of his testimony that only a weekly average of two hours was spent in his commercial employment. Since in the administrative proceedings before the board the burden of proof was upon the registrant to sustain his claim of exemption under a IV-D classification, the absence of corroboration was significant. *U. S. ex rel. Steinberg* v. *Graham,* 57 F. Supp. 938; *Rose* v. *United States,* 129 F. 2d 204; *Harris* v. *Ross,* 146 F. 2d 355; and *U. S.* v. *Geesen,* 59 F. Supp. 726. The evidence shows that his own testimony on the point, though received and considered by the local board was not fully believed. Surely the petitioner's right to present evidence and have it considered does not include an iron-clad right to have all his testimony believed. Here the board's recorded skepticism as to the petitioner's veracity was later confirmed by his admission at the trial that in order to obtain secular employment he had deliberately misstated his age. This is so even if, as his counsel offered at the trial to prove, the employment was sought to enable him to accumulate a fund for self-support during a coming period of ministerial activity. If he lied, as he admits, to obtain pecuniary means of support for his ministerial activity it is not unreasonable to infer that he might have lied to escape such interference with his ministry as would result from a 1-A classification.

All things considered, it cannot be said that the board acted without evidence. The *Estep* opinion does not suggest that a court may invalidate an administrative finding merely because on the same evidence it might have found otherwise: instead it expressly holds to the contrary.

Nor is there evidence of arbitrary or capricious administrative action. The fact that the board for so long continued the petitioner's IV-D classification is convincing demonstration that its members were not unduly prejudiced

by his mere membership in the sect. Petitioner's counsel, however, contends that his conduct in posing in military uniform for commercial gain while enjoying exemption under a IV-D classification created a prejudice against him in the mind of the board.

The fact that the petitioner from such soft work enjoyed a higher rate of compensation than basic army pay might possibly have had a tendency to create prejudice. But an administrative determination having at least some support in the evidence may not properly be invalidated merely because of a possibility of prejudice resulting from the petitioner's own conduct. Otherwise, in any case invidious or contemptuous conduct might in practical effect serve as a ground of exemption and thus thwart the urgent legislative objective. When, as noted above, there was conceded evidence of commercial as well as ministerial employment, the administrative action must be attributed to the state of the evidence, and not to a state of emotion not affirmatively shown to have existed. *U. S ex rel. Hull v. Stalter*, 154 F. 2d 633.

It may be further noted, however, that at the petitioner's trial the court allowed a member of the local board to be cross-examined by petitioner's counsel as to the mental processes upon which the official determination was based. In so doing, the court went further, I should suppose, than the law required for the protection of the petitioner's rights. However that may be, the cross-examination, instead of disclosing prejudice, elicited testimony to just the opposite effect.

Other allegations in the petition have not been overlooked. It recites that after the petitioner was finally classified by the local board as 1-A, the board "refused to permit him to offer full evidence of his exemption and denied a fair hearing, thus abridging his procedural rights to make a complete record before the Board of Appeal." In view of his testimony at the time of the trial that the Board re-

ceived all the evidence and testimony which he offered and the fact that his entire file was transmitted to the Board of Appeal, I can only treat this allegation as made out of extravagance. Certainly it has not been sustained.

The petitioner further alleges that the Board violated the Selective Service Regulations in that it "failed to make a full, adequate and complete record in writing of all the evidence offered at said hearing", in violation of Regulations 622, 623 and 627.13. This latter regulation, it is true, requires that, on notice of appeal, "if any facts considered by the Local Board do not appear in the written information in the file, the Local Board shall prepare and place in the file a written summary of such facts." However, this requirement plainly does not contemplate that the file in the case must be expanded by irrelevancies; all that is required is that the record shall be sufficiently complete to enable the Board of Appeal to perform its assigned function and make a classification on the basis of the record received from the local board. Regulation 627.24. If the Board of Appeal deems the file to be incomplete, provision is made for its correction. Reg. 627.23. Here, however, the Board of Appeal made no request for correction of the file: apparently it considered the file sufficient for the proper performance of its function.

It is true, as was stated in my findings, that the only written minute of the petitioner's testimony as to the extent of his employment as a commercial model was brief and indicated that the local board had found the defendant's answers "evasive". And it is also true that Reg. 627.13 stated that "in preparing such a summary the local board should be careful to avoid the expression of any opinion *concerning information* in the registrant's file and should refrain from including any argument in support of its decision."

Having in mind that under the administrative system only the local board had opportunity to see and hear the

witnesses and thus to form a first hand conclusion as to their veracity and that the Board of Appeal acts only on the written record, I do not construe the regulation just quoted as prohibiting the local board from indicating that it has questioned the veracity of the witness on a specified point.

Even if under a proper construction of the regulations it were felt that the local board had failed to fully comply with Reg. 627.13, the defect was at most technical and not of such substance as to infringe any constitutional right. Indeed, it appears to have been waived. For under Reg. 627.12 the registrant may attach to his notice of appeal "a statement specifying the respects in which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file." As my findings show, the petitioner here availed himself of this right to the full extent desired but made no charge that the minutes of the local board were inadequate.

In this connection, it may be noted that this petitioner was neither dull nor ignorant of his legal rights. Scarcely a month after his statement of appeal had been filed he reported for induction, as he himself testified, in order to "exhaust my civil remedies." If he knew that submission to the board order was necessary for such a purpose it is fairly inferrable that he knew enough to include in his statement of appeal any evidence which would have been favorable to him. Moreover, the note appended to his letter to the Board imported familiarity with the Regulations. (Finding 12)

The foregoing conclusions, in my view, dispose of this case on the merits. But more is needed to dispose of all of the petitioner's contentions. For he argues that his constitutional rights were violated not only by the Selective Service agencies but by the trial court as well, and that

unless he is given an opportunity to have a jury pass upon a defense which according to my ruling, though admissible in law, is without support in the facts, his remedy is incomplete.

But as to this, the Sixth Amendment of course does not require submission to a jury of an issue of fact wholly unsupported by the evidence. At the petitioner's trial he testified that he had told the local board of his current commercial activity and his previous full-time commercial employment. Thus by his own concession the board had some evidence in support of its 1-A classification and it could not be said that its action was without evidence. A careful examination of the transcript discloses that all the evidence received and all the factual evidence (as distinguished from argument and conclusions) which the defendant at his trial had offered to prove, contained no basis for a finding that the local board had acted arbitrarily or illegally. That being so, no question as to the validity of the administrative action was left for submission to the jury. And the charge of the trial judge which excluded from the jury a consideration of the validity of the classification can perhaps be justified, without collision with the law as later announced by the Supreme Court, by the absence of evidence to support an attack on the validity of the classification. As Mr. Justice Douglas observed in the *Estep* case, the provision of the Act that the decisions of the local boards shall be *final* "means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

It is true that in the Estep and Smith cases the Supreme Court ordered new trials. But in so doing the court was acting under the appellate process upon appeals directly taken from the convictions complained of. In such a situation it was not the function of the appellate court of last resort to make an original determination as to the validity of the underlying administrative orders. It does not follow that in the pending habeas corpus proceedings sitting here at the base of the judicial pyramid I should assume to issue such a mandate to a sister court. Under the writ I have power only to release or remand.

Mr. Justice Holmes observed in *Frank* v. *Mangum*, 237 U. S. 309, 345:

> " . . . habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."

Having invoked the writ the petitioner cannot complain if I look behind the trial and examine the validity of the administrative action thus cutting "to the very tissue of the structure" of his grievance. This I have done and find that the petitioner has failed to sustain the burden of proving the invalidity of the administrative action complained of. The burden of proof was on the petitioner. *Johnson* v. *Zerbst*, 304 U. S. 458, 468; *Estep* v. *U. S.*, supra.

And if, as I hold, the administrative action was valid in law and in fact, the action of the trial court could not possibly have deprived the petitioner of a valid defense.

IT IS ACCORDINGLY ORDERED that the writ be discharged and that the petitioner be remanded.

Dated at New Haven this 6th day of May, 1946.

C. C. Hincks
United States District Judge

Notice of Appeal

Now comes petitioner, John Myron Kulick, in the above entitled cause and hereby gives notice of appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment and order of this Court dated May 6, 1946, discharging the writ of habeas corpus as prayed for in the petition and remanding the petitioner to custody of respondent, wherein petitioner avers that he is held and restrained in violation of the Constitution.

Said petitioner herewith files his bond on appeal in the amount of $500.00 as required by the Rules of Civil Procedure of the District Courts of the United States.

HAYDEN C. COVINGTON
117 Adams Street
Brooklyn 1, New York
Attorney for Petitioner

Order Admitting to Bail

On this 20th day of June A. D. 1946 came on to be heard the application of John Myron Kulick to be admitted to bail pending appeal from the judgment and order remanding him to custody of M. L. Kennedy, Warden and upon hearing counsel it is hereby

ORDERED that the said petitioner, John Myron Kulick, be released from custody during the pendency of such appeal upon the filing with the Clerk of this Court a bond in the sum of Two Thousand Dollars ($2000.00) condition in the term and manner required by law, with good and sufficient surety. The condition of such bond shall be upon the petitioner Kulick making his appearance before the United States District Court for the District of Connecticut, and delivering himself to the United States Marshal for the District of Connecticut to return to the custody of the

respondent or his successor, upon final disposition of such appeal: It is further

ORDERED that the respondent shall release John Myron Kulick from custody upon receipt of a certified copy of this order and a copy of said bond filed with the Clerk, which shall be sent to him by mail by the Clerk of this Court.

Enter. Done at New Haven, Connecticut, on this 20th day of June, 1946.

C. C. Hincks
United States District Judge

Bail Bond

Whereas, on the 20th day of June, A. D. 1946, the United States District Court for the District of Connecticut, pursuant to the Rules of the United States Circuit Court of Appeals for the Second Circuit admitted the petitioner, John Myron Kulick to bail and from the custody of the respondent, M. L. Kennedy, pending a disposition of an appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment discharging and dismissing the writ of habeas corpus and remanding Kulick, in which order the amount of the bond was fixed at Two Thousand ($2,000.00) Dollars

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that we, John Myron Kulick, Principal, and the undersigned surety, are held and firmly bound unto M. L. Kennedy, and the United States of America, in the just and full sum of Two Thousand ($2,000.00) Dollars to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

SEALED with seal and dated this 21st day of June, in the year of our Lord one thousand nine hundred and forty-six.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that whereas, the aboye John Myron Kulick, who stands committed and remanded to the custody of the respondent, M. L. Kenedy, to serve the sentence imposed against him by the United States District Court for the Southern District of New York, desiring to appeal from the judgment discharging the writ of habeas corpus and remanding said petitioner and having stated in open court that he shall appeal from said judgment, having appealed from such judgment and having been ordered admitted to bail on the condition that he fully and promptly comply with the final orders and judgment that may be entered upon said appeal, and it is further the condition of said obligation that if the said John Myron Kulick, shall make his personal appearance before the United States District Court for the District of Connecticut and deliver himself to the United States Marshal for the District of Connecticut to be surrendered to the custody of the respondent, M. L. Kennedy, Warden, or his successor in office, in event the judgment of this Court is affirmed upon appeal, when the mandate is returned to the District Court upon said appeal, or if the said John Myron Kulick shall make his personal appearance before the United States District Court for the District of Connecticut and deliver himself to the United States District Court when the mandate is returned to the District Court upon said appeal submit himself to such order and judgment as announced upon appeal and make full and prompt compliance with such further order and judgments as may hereafter be announced by the District Court in this cause upon the return of the mandate upon appeal, then this obligation to be void, and in event he fails to make full and prompt compliance with the foregoing terms and conditions this obligation shall remain in full force and effect.

Executed, to which witness our hands and seals this

the 21st day of June, 1946, at New Haven, Connecticut.

John Myron Kulick, Principal
NATIONAL SURETY CORPORATION
By
Attorney in Fact.

The foregoing bond is approved and ordered filed this the 21st day of June, A. D. 1946.

C. C. Hincks, Judge
United States District Court.

ORDER

DIRECTING CLERK OF UNITED STATES DISTRICT COURT TO SEND ORIGINAL EXHIBITS TO COURT OF APPEALS FOR SECOND CIRCUIT TO BE INCORPORATED IN TRANSCRIPT OF RECORD BY REFERENCE

On this day of June 1946 came on to be heard the application of petitioner-appellant, JOHN MYRON KULICK, for an order directing the Clerk of the United States District Court to send to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, along with the transcript of the record in this cause, the original exhibits received in evidence and considered by the court in deciding this case; and the court being of the opinion that such application should be in all things granted, it is hereby

ORDERED that the Clerk of this court incorporate all the exhibits into the transcript by reference and that when the transcript of the record is prepared and sent to the Clerk of the United States Circuit Court of Appeals all of such exhibits shall accompany the transcript in their original form, without the necessity of copying any of said exhibits.

Done at New Haven, Connecticut, on this day of June 1946.

C. C. Hincks *United States District Judge*

ORDER
Extending Time to File Transcript of Record

On this 26th day of June 1946 came on to be heard, in the above entitled and numbered cause, the application of the petitioner-appellant for an order extending the time to file the transcript of the record in the Court of Appeals; and the court upon consideration thereof is of the opinion that the application should be granted. It is therefore accordingly

ORDERED that the time to file the transcript of the record with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be extended to and including August 1, 1946.

Done at New Haven, Connecticut, on this 26th day of June 1946.

C. C. Hincks
United States District Judge

Stipulation as to Record and Exhibits

It is hereby stipulated and agreed between the parties that in lieu of a typewritten transcript of the record prepared by the Clerk the record upon appeal in this cause may be printed by appellant and certified by the Clerk for filing in printed form with the Clerk of the United States Circuit Court of Appeals for the Second Circuit.

It is stipulated that the printed transcript of the record to be tendered to the Clerk for certification shall include the following:

1. Petition for writ of habeas corpus.
2. Order granting writ of habeas corpus.
3. Writ of habeas corpus.
4. Return of respondent.
5. Supplemental return of respondent.
6. Stenographer's report of proceedings and evidence

received upon the hearing of the writ of habeas corpus, including original exhibits introduced in evidence, by reference.

7. Memorandum decision of the district judge containing findings of fact and conclusions of law and the order remanding petitioner to custody and discharging the writ of habeas corpus.

8. Notice of appeal.

9. Appeal bond.

10. Order extending time for filing transcript.

11. Order directing the sending up of original exhibits to the court of appeals.

12. Copy of this stipulation.

13. Certificate of the Clerk to the printed transcript incorporating the original exhibits by reference into the transcript.

In order to simplify consideration of the appeal, all documents, papers and exhibits received in evidence omitted from the printed record on appeal may be referred to orally and in briefs and handed up to the court on argument of the appeal with the same force and effect as though incorporated herein.

Dated July 9, 1946.

ADRIAN W. MAHER
United States Attorney

VALENTINE J. SACCO
Ass't United States Attorney

HAYDEN C. COVINGTON
Attorney for Defendant-Appellant

Stipulation as to Record and Exhibits

It is hereby stipulated and agreed that the foregoing printed papers tendered by the Petitioner-Appellant are correct in every particular. With the exhibits, made a part hereof by reference, and all of which may be filed with and submitted to the Circuit Court of Appeals in their original form, it contains all the evidence in this cause. The said exhibits are hereby made a part of this record upon appeal. The foregoing are stipulated to be the record in this cause upon appeal.

The foregoing record is a true transcript of the record of the District Court. It is stipulated that the Clerk shall file it in lieu of the original papers. The Clerk of this court is requested to certify the foregoing printed copy of the record to the Clerk of the Circuit Court of Appeals as the record on appeal in this cause.

Dated, New Haven, Connecticut, July , 1946.

ADRIAN W. MAHER
United States Attorney

By
Ass't United States Attorney

HAYDEN C. COVINGTON
Attorney for Petitioner-Appellant

Clerk's Certificate

I, Charles E. Pickett, Clerk of the District Court of the United States of America for the District of Connecticut, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties, and stipulated to be filed in this court.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at New Haven, Connecticut, in the District of Connecticut this day of July in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventy first.

[Seal] CHARLES E. PICKETT, Clerk

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 52. October Term, 1946

Argued October 8, 1946—Decided October 29, 1946

Docket No. 20311

UNITED STATES EX REL. JOHN MYRON KULICK, APPELLANT

v.

M. L. KENNEDY, WARDEN, APPELLEE.

Before L. HAND, SWAN, and FRANK, Circuit Judges.

Appeal from an order of the District Court for the District of Connecticut, dismissing a writ of habeas corpus to release the relator from custody under a conviction for failing to submit to induction into the United States Army.

Hayden C. Covington, for the appellant.
Valentine J. Sacco, for the appellee.

L. HAND, Circuit Judge:

Kulick appeals from an order, dismissing a writ of habeas corpus, issued to discharge him from custody under a judgment, entered upon the verdict of a jury, convicting him of failing to submit to induction into the United States Army. The only issue is whether he was deprived of the defense that the induction order of the local board, affirmed by the appeal board, was invalid which had denied him exemption under § 5 (d) of the Act, as "a regular or ordained minister." Three questions arise: (1) whether he may avail himself of habeas corpus at all, because he failed to appeal from the judgment; (2) if so, how far the writ can serve as a substitute for an appeal; (3) whether, if it is a sufficient substitute, he was prevented from proving as a defense that the induction order was invalid. The facts ~~were as follows:~~ Kulick registered for the draft on June 30, 1942, and filled out and mailed his questionnaire on December 5, 1942, which he accompanied by two documents, claiming exemption as a "regular or ordained minister" of the sect of Jehovah's Witnesses. He was ordered to report for preliminary physical examination on January 2, 1943, and was found fit; and on March 30, 1943,

311, Title 50, Appendix, U. S. Code.

the local board—"Local Board No. 254"—classified him as "1A," and so advised him. Apparently the documents, which he submitted on December 5th, satisfied the board that he was entitled to the exemption, for on May 5, 1943, they wrote him that he had been so classified. Nothing happened to disturb this for over a year; but on August 23, 1944, the board received a telephone message from a Mrs. Greenbaum, who was connected in some way with another local board—"Local Board 255"—that "a mother of three sons in service was at Board 255 raising quite a fuss because this boy is *not* in service. According to this neighbor Kulick spends most of his time around the house when he isn't posing (at times in uniform) earning $40 an hour." On the same day, undoubtedly because of this information, the local board reclassified Kulick as "1A," and so wrote him; and this it followed on August 25 by an order directing him to report for a "pre-induction" physical examination on September 11th. On the 26th he replied by a letter, again claiming exemption under § 5 (d), and asking for a hearing, which the board gave him on the 30th. At that time he submitted an affidavit and a written statement, asserting that he was a "regular or ordained minister" of Jehovah's Witnesses; and he testified at length. (There was no stenographer present, and the only record of what he said is his own testimony at the trial and that of one member of the board whom he then called.) At the conclusion of the hearing the board again voted to retain him in "1A" and so informed him on the 31st.

He reported for his "pre-induction" physical examination on September 11th, as ordered, and was again found physically fit. He appealed to the appeal board on or about September 16th, which on September 28th affirmed the order of the local board. He must have learned of the affirmance before October 8th, for on that day he asked for another hearing by the local board, which was granted. He appeared on the 11th, but there is no record of what took place except that his classification was not disturbed. On October 16th, he wrote to the Director of Selective Service, asking him to appeal to the President; but, as the Director did not do so, the local board ordered him to report for induction on November 9th; and on that day he did appear at the induction center, but refused to take the oath. The trial upon the indictment for so refusing, came on in the Southern District of New York on May, 1945, and the judge acting in conformity with the rule laid down in *Falbo* v. *United States*,[1] left no question to the jury except whether

[1] 320 U. S. 549.

Kulick had refused to be inducted; although during the trial he did, somewhat inconsistently, allow some testimony to be admitted, bearing upon the hearings before the local board. However, he ruled out many questions which would have been material if the validity of the board's order had been an issue, and prevented a proper development of the defense, if it was one. Kulick was sentenced on May 7, 1945, and never appealed. The petition for the writ now at bar was filed on February 27, 1946, while Kulick was serving his sentence in Danbury, Connecticut.

On February 4, 1946, the Supreme Court handed down its decision in *Estep* v. *United States*,[1] which held that those drafted, after exhausting their administrative remedies, might challenge the validity of the Board's order inducting them into the Army, upon a trial for violating § 311. Until then it had been generally supposed that the earlier decision in *Falbo* v. *United States*, *supra*,[2] forbad this, and that upon such a trial the invalidity of the induction order was not in issue. Although *Billings* v. *Truesdell*,[3] had held that those who refused to be inducted were not subject to court martial, nothing more followed from this than that the civil courts alone had jurisdiction to decide who were members of the armed forces; those who resisted induction still remained subject to prosecution under § 311, without defense that their induction had been illegal. During this period we twice affirmed convictions in which any inquiry into the validity of the induction had been refused, and many other circuits ruled the same way.[4] The Supreme Court denied certiorari to our decision in *United States* v. *Flakowicz*, *supra*,[5] on April 30, 1945, and although, when *Estep* v. *United States*, *supra*,[6] was in the circuit court of appeals, two of the six judges (Biggs and Leahy, JJ.) dissented, that was in July, 1945; and Kulick's time to appeal from his conviction had expired on May 12, 1945.

The first question is whether the situation between May 7, 1945, when Kulick was convicted, and May 12th, when his time to appeal had expired, made any appeal so obviously fruitless as to excuse taking one; and whether, if it did, that opened the road after February 6, 1946, to a review of his conviction by habeas corpus. The district judge in the case

[1] 327 U. S. 114.
[2] 320 U. S. 549.
[3] 321 U. S. 542.
[4] Seventy other decisions are collected in Justice Frankfurter's opinion in *Estep* v. *United States*, *supra*, at 120 (327 U. S. 114).
[5] 146 Fed. (2) 874.
[6] 325 U. S. 851.
[7] 327 U. S. 114.

at bar thought it did, and we agree. We shall not discuss at length the occasions which will justify resort to the writ, where the objection has been open on appeal. After a somewhat extensive review of the authorities twenty-four years ago,[10] I concluded that the law was in great confusion; and the decisions since then have scarcely tended to sharpen the lines. We can find no more definite rule than that the writ is available, not only to determine points of jurisdiction, *stricti juris*, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice. The occasion at bar is such; certainly the reasons for allowing it are more compelling than were those in *Bowen* v. *Johnston*,[11] where there merely appeared "to be uncertainty and confusion * * * whether offenses within" a national park "are triable in the state or federal courts." It would pass all fair demands upon Kulick's diligence to conclude him because of his failure to appeal. Not only had there not been any glimmer of a positive chance of success, but there had been an unusual consensus of judicial opinion against it in the lower courts. Moreover, although a number of the decisions could be explained upon the ground that those inducted had not wholly exhausted their administrative remedies;[12] in a number of others they had done so; and no distinction had been established between the two. Indeed, in *United States* v. *Flakowicz*, *supra*,[13] which had been one of these, the Supreme Court denied certiorari only a fortnight before May 12th. While that court has said over and over again that such denials are not to be taken as affirmances, it was not to be expected on May 12, 1945, that the court would grant a writ in precisely the same circumstances in which it had just denied one. Our reasoning so far has the support of the Fourth Circuit in *Sunal* v. *Large*.[14] As for *Rea* v. *McDonald*,[15] it was decided on January 12, 1946, at which time there was no ground for allowing a writ, for *Falbo* v. *United States*, *supra*,[16] was still regarded as controlling. Nor does it trouble us that certiorari in that case was denied after *Estep* v. *United States*, *supra*,[17] had been decided. Perhaps after February 6, 1946, Rea could have shown as an excuse for a new writ that he had been misled; but at the time he sued out the writ which he did sue out, there

[10] *Ex parte Craig*, 282 Fed. Rep. 141, 155–159.
[11] 306 U. S. 19.
[12] *United States* v. *Nelson*, 143 Fed. (2) 584 (C. C. A. 2).
[13] 146 Fed. (2) 874.
[14] 157 Fed. (2).
[15] 153 Fed. (2) 190 (C. C. A. 5).
[16] 320 U. S. 549.
[17] 327 U. S. 114.

was no such excuse. We hold therefore that the district judge had jurisdiction to entertain the writ, and the next question is how far it may search the record in the criminal trial.[18]

The books are indeed full of statements that habeas corpus goes only to the jurisdiction of the court, or at least to matters fundamental to the exercise of its power like the constitutionality of a statute; and that it can never be used as a substitute for an appeal. The Fourth Circuit in *Sunal* v. *Large*, *supra*,[19] thought this limitation applicable to the situation before it, which was the same as that at bar. It did indeed examine the record before the local board to see whether there was substantial evidence to support the finding; but, having found that there was, it refused to go further; and we are not altogether clear why it thought that if could go even so far as it did. In any event it appears to us that if the writ is to be allowed at all, it must extend to whether the accused was denied the right to establish, by any evidence available to him, that the induction order was invalid. He may do this, either because from all the evidence before the board, recorded or not, there appeared to be no basis for its decision; or because the board for any reason had denied him a fair hearing. As we understand it, at his trial he may call the members of the board and may himself take the stand; he may testify to what he told them, and he may cross-examine them as to their motives, and in general as to the basis of their finding. In conclusion he may ask the jury to say whether, in the light of all that they have heard, it is not plain that the board did deny him a fair hearing, and did no try to classify him as he deserved. If he can satisfy even a single juror that this is true, (conceivably, even if he can arouse in the juror's mind a doubt about it), he will succeed. So far as appears, in *Sunal* v. *Large*, *supra*,[20] the court did not mean to say that the issue was not as broad as we have just described it; and possibly the record of Sunal's trial disclosed nothing more than an offer of the written record before the local board. If so, we should agree that, if that record showed sufficient evidence to support the classification, and no basis for suspecting bias or prejudice, its exclusion was not an error. Be that as it may, in the case at bar that was not the sum of what Kulick showed, and tried to show, and incidentally, as we have said, the record before the board did not preserve any testimony there taken. Surely it can never be tenable to make critical what chances to be

[18] *Callan* v. *Wilson*, 127 U. S. 540.
[19] 157 Fed. (2).
[20] 157 Fed. (2).

preserved in that record. Evidence is no less evidence because it is not recorded; and anything which in fact tends to establish that the accused did not have a fair hearing must be available in support of his defense, from whatever source it comes. Therefore, it seems to us that, if the writ is to go at all, it must search the record at the trial without reserve, at least so far as to enable the habeas corpus court to decide from all the evidence which was before the board, whatever its form, whether the order was valid. We submit that it would be absurd at once to say that the accused may use the writ, and yet so to circumscribe its office that he cannot redress the wrong, whose assumed existence is the only reason for not confining him to an appeal. To that extent we hold that habeas corpus is the full substitute.

The last question is whether, in the light of what we have just said, there is ground for a reversal of the conviction. Even without considering the rulings at the trial which shut out the full development of the defence, enough got in to support at least a plausible argument that a verdict should have been taken. The board had originally granted the exemption, and had left it undisturbed for over a year; and the jury could scarcely have failed to conclude that it was the communication from "Local Board 255" which caused the change. That communication was in two parts; first, it spoke of the "fuss" made by the angry mother of three sons; second, it contained a statement about Kulick himself; and it was by no means inevitable that the first might not have had, not necessarily a controlling, but at least a contributing, part in the change of classification. Furthermore, Kulick apparently persuaded the board at the August hearing that he regularly preached five hours a day; and there was strong reason for saying that that made him a "regular minister" within the extremely latitudinarian interpretation which "Opinion No. 14" put upon the term, "regular minister," when applied to Jehovah's Witnesses.[21] However, we will not say that, standing alone, this did make a case for a verdict; for it did not stand alone. One cannot read the record of the trial without being at once persuaded that the judge circumscribed Kulick in proving his de-

[21] "Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which one normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded."

fense, defined as we have defined it. It was inevitable that he should have done so as he understood the law; indeed, the surprising thing is that he should have allowed as much to go in as he did.

For the foregoing reasons we hold that the judgment must be reversed, and Kulick must be discharged from custody. That, however, need not end the prosecution, as would be true, if the writ went merely to the jurisdiction of the court, or to the constitutionality of the statute. The indictment will remain open to any further action which the prosecution may choose to take.

Order reversed; relator discharged.

United States Circuit Court of Appeals
Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of October one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

United States ex rel. John Myron Kulick,
relator-appellant

v.

M. L. Kennedy, Warden, etc.,
respondent-appellee

Appeal from the District Court of the United States
for the District of Connecticut

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed, and relator discharged in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, *Clerk.*

[Judgment, United States Circuit Court of Appeals, Second Circuit. Filed October 29th 1946. Alexander M. Bell, Clerk.]

UNITED STATES OF AMERICA,
Southern District of New York:

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 92, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States ex rel. John Myron Kulick, Petitioner-Appellant, against M. E. Kennedy, Warden, Respondent-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3rd day of December, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventh-first.

[SEAL] (S) ALEXANDER M. BELL, *Clerk.*

Supreme Court of the United States

No. 840, October Term, 1946

Order allowing certiorari

Filed January 20, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.